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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1327.

GEORGE H. COPE, APPELLANT,

vs.

JANET COPE AND THOMAS H. COPE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 29, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1890.

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a Supreme Court of Utah.

File No. 88.

In the Supreme Court of the Territory of Utah. June Term, 1890.

In the Matter of the Estate of THOMAS COPE, Deceased, GEORGE H. COPE, Appellant,
vs.
JANET COPE and THOMAS H. COPE, Respondents.

Transcript.

Sutherland & Judd, C. O. Whittemore, and S. P. Armstrong, attorneys for appellant; Le Grand Young and John M. Zane, attorneys for respondents.

Marked: Filed April 4, 1890.

JOSEPH P. BACHE, *Clerk.*

1 In the Supreme Court of the Territory of Utah. June Term, 1890.

In the Matter of the Estate of THOMAS COPE, Deceased, GEORGE H. COPE, Appellant,
vs.
JANET COPE and THOMAS H. COPE, Respondents.

In the Probate Court within and for Salt Lake County and Territory of Utah, before the Hon. Elias A. Smith, Judge.

In the Matter of the Estate of THOMAS COPE, Deceased.

To the Hon. Elias A. Smith, judge of said court:

Your accountant, Thomas Jack, of Salt Lake City, in Salt Lake county, in the Territory of Utah, now comes and as administrator of the estate of Thomas Cope, deceased, makes his report and files this his account, and says:

Thomas Cope, the decedent, died in Salt Lake county aforesaid on the 22d day of August, 1864, leaving the following-named
2 persons as his family dependent on him for support: Janet Cope, his widow or first wife; Thomas Cope, now sometimes known as Thomas H. Cope, his son, aged about 14 years; Margaret Cope, a plural wife; George H. Cope, aged about 2 years, a son of Margaret Cope and himself. These constitute the heirs to his estate. He further reports that no administration was granted in his estate until January 23d, 1872. During the time between August 22d, 1864, and January 23d, 1872, Mrs. Janet Cope and Thomas Cope lived together on a lot of land in Salt Lake City survey, in Salt Lake county and Territory of Utah, to wit, lot number five, in block number three, plat "B," of said survey; and the said Margaret Cope

and her son, George Cope, lived together in lot number four, in said block three and plat "B." These made use of the household goods for their respective use and benefit, and made their living by the use of the decedent's property and their own industry.

He further reports that the decedent left land claims on those two lots and a land claim for lot number two, in block number fourteen, in plat "B," of said city, and a land claim on a lot in the five-acre big field survey, which lot is known as lot number sixteen (16), in block number eighteen (18), in said survey, but he did not then have any legal title to any of these land claims; yet he was the owner of the improvements on all these land claims.

He further reports to the court that he, your accountant, was, on the 23d day of January, A. D. 1872, duly appointed by this court administrator of said estate, the primary object of which was to obtain the legal title to said land claims for the benefit of said heirs. He further says that he obtained the legal title to these several pieces of land, but in each case the deed was made to the heirs of said estate without naming them, except one, that of lot number four, in block number three, in plat "B," of Salt Lake City survey, which was given to the said Margaret Cope under the name of Margaret Parry, on which, at the time of the death of the decedent, there were reasonably good improvements belonging to said estate.

He further reports to the court that prior to January 23d, 1872, but after the said Thomas Cope had arrived at full age, they, the said Janet Cope, the said Margaret Cope, and the said Thomas
3 Cope, by the advice of friends, mutually agreed that the said Janet Cope should have for her use said lot numbered five, in block three, in plat "B," of said survey, and that Margaret Cope should have for use said lot number four, in block number three, of plat "B," of said survey, and that the said George Cope should have in his own right said lot number two, in block number fourteen, in plat "B," of said survey, and that the said Thomas Cope should have in his own right the said lot number sixteen (16), in block number eighteen, in the said big field five-acre survey.

In this condition he, your accountant, found the estate at the time he was appointed administrator of said estate, and for this reason there was no inventory or appraisement of said estate made and filed in this matter.

Your accountant permitted each one of these to occupy and use the land claims above mentioned. The said Margaret Cope, as the natural guardian of her son, George Cope, occupied and received the rents, issues, and profits of the said lot set apart to him; that there was not nor has there ever at any time any part of the rents, issues, and profits of any of those lots or land claims come into his possession or control, except as hereinafter stated as coming from the said five-acre lot, and no other property whatsoever ever come into his possession or control belonging to said estate.

He further reports to the court that said Janet Cope and the said Thomas H. Cope were in the occupancy of the said five-acre lot and were receiving the profits arising therefrom at the time your accountant was appointed administrator of said estate, and continued

so to occupy the same and receive the profits thereof for about three or four years, on which said last date he, the said Thomas H. Cope, with the concurrence of the said Janet Cope, surrendered the possession of the said five-acre lot to your accountant, and from that date till the present time your accountant has conducted in such possession and farmed said five-acre lot on shares, he giving one-third of the crop for the use thereof to the said Janet and Thomas H. Cope annually, and these heirs or family of the decedent using the rents, issues, and profits as to them seemed just, he, your accountant not interfering with them. He now believes substantial justice was done between them.

4 Your accountant further reports to the court that the house on said lot number 4, in block number three, in plat "B," occupied by the said Margaret Cope and her son, George Cope, was in a reasonable good condition, but the house and lot number five in said block occupied by the said Janet Cope and the said Thomas Cope was not suitable for use without repairs. He, therefore, with the approval of the said Janet Cope and the said Thomas Cope, expended out of his own funds in repairs of said house the sum of two hundred and thirty-four dollars and forty-five cents, the items of which he herewith files as an exhibit, marked Exhibit "A." As evidence that Margaret Cope occupies lot number 2, block 14, plat "B," and in behalf of her son George Cope, he herewith files her receipt, marked Exhibit "B," and makes it a part of this report.

He further reports to the court that in obtaining the legal title of the said five-acre lot it was necessary for one John J. Conk to obtain a patent from the United States of America for the east half of the southwest quarter of section eighteen, township one south, range one east, Salt Lake meridan, on which about four acres of the said five acres is situate, and Mr. Conk deeded these four acres to the said Thomas Cope on the 8th day of March, 1873, so that he, the said Thomas Cope, now holds the legal title to the said four acres, and the balance of said lot, being about one acre, was deeded to the heirs of said estate as before stated.

He further says he has paid out of his own funds the sum of $50.00 to obtain these several titles, and for taxes the sum of $11.90 on the city lots only and the sum of — taxes on the five-acre lot.

He further says that he has never reserved or retained any compensation for his services, and he therefore prays the court for a reasonable allowance to be made, which in his opinion ought to be not less than one hundred and thirty dollars.

He further says his attorneys' fees are fifty dollars, and were more if a litigation ensues.

Recapitulation.

He claims credits for—

1.—In 1875 money paid to repair the house of Janet Cope $234 45

5 Interest thereon for ten years 234 45

Amount paid for getting title	$50 00
Interest thereon for twelve years	60 00
Attorneys' fees	50 00
Compensation of administrator	130 00

Court charges and clerk fees in granting letters of administration to be computed.

In explanation he further says that in 1875 he, your accountant, acting on the belief that Thomas Cope, who, as aforesaid, sometimes signs his name Thomas H. Cope, and who is a son by a deceased wife of the decedent, was legally and equitably the owner of the said five-acre lot, entered into an agreement with him to conduct and farm said five acres and to give him for the use of himself and his stepmother, the said Janet Cope, one-third of the products of said land, and that it was and is a poor piece of land, and the one-third of the income has not annually exceeded ten dollars, so that he now occupies said land not as an administrator, but as a tenant under said Thomas Cope.

And now, having fully reported this matter, he prays this court to make such an order in this — as law and equity may require.

THOMAS JACK,
Administrator of the Estate of Thomas Cope, Deceased.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

I, Thomas Jack, make oath and say that I am the administrator of the estate in the foregoing matter; that I have heard read the foregoing report and know the contents thereof, and that from my own knowledge I know the same is true except the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

THOMAS JACK.

Subscribed and sworn to before me this 19th day of June, 1885, at said county.

JOHN C. CUTLER,
[SEAL.] *Probate Clerk, Salt Lake Co.*

6 EXHIBIT "A."

Thos. Jack to the Hon. E. A. Smith, judge of probate:

Items of Money Expended on Building House on Cope Estate.

1875, 2,045 feet lumber	$100 00
Frames, doors, and windows	6 00
3,500 shingles and nails	24 00
Lumber curtains and lath	16 20
Lath nails and hair for plaster	2 20
Facing for doors and windows	1 00

1875, Locks and hinges and sand	$4 25
Lime and lumber	6 30
" brick for chimney	5 50
Plastering house and building chimney	17 00
Carpenter work	40 00
Flower, wheat, and plowing	12 00
Total	$234 45

Received from Thos. Jack for building house for Janet Cope two hundred and thirty-three dollars and sixty-five cents ($233.65) in 1875.

THOS. H. COPE.

EXHIBIT "B."

SALT LAKE CITY, *June 3d*, 1885.

Thos. Jack:

This is to certify that I have received from Charles Schneitter the sum of $96.00, being 8 years' rent of lot 2, block 14, plat "B." Bp. Warburton paid me 7 years; Chas. Schneitter paid me one year; total, 8 years.

MARGARET T. COPE.

Filed June 19th, 1885.

JOHN C. CUTLER,
Probate Clerk, Salt Lake Co.

7 (Title of Court and Cause.)

Thomas Jack, the administrator of the estate of Thomas Cope, deceased, having, on the 19th day of June, A. D. 1885, rendered and filed in this court a report and final account of his administration of said estate; and afterwards, to wit, on the 29th day of June, A. D. 1885; said matter coming on regularly to be heard and due proof having been made to the satisfaction of this court that notice of the time and place of the settlement of said account had been given by the clerk of this court, as required by law and the order of this court;

And George H. Cope, a son and one of the heirs of said deceased, by his attorney, C. O. Whittemore, having appeared and filed objections to the said account and report:

The court proceeded to a hearing of said account and the objections thereto, which hearing was by counsel, *was* postponed from time to time, and finally, on the 5th day of September, A. D. 1885, the court, after hearing all the testimony offered in evidence and arguments of counsel for respective parties, took the matter under advisement.

And now, on the 3d day of February, A. D. 1888, the court, being fully advised in the premises, finds the following:

That due notice of the settlement of said account and of the time

and place of hearing the same was duly given by the clerk of this court, as required by law and the order of this court.

That as to the sum of $234.45 charged in said account for money paid to repair the house of Janet Cope and the sum of $324.45 charged for interest thereon, the same was made in part payment to Thomas H. Cope on an account between said Thomas H. Cope and said administrator, and is not a proper charge against said estate, and the same is hereby disallowed.

That the item for $50 charged for obtaining title to property belonging to said estate is $25 in excess of the amount actually paid, and the sum of $25 is allowed therefor.

That the item of $60 charged for interest on said account is not a proper charge against said estate, and the same is disallowed.

That the sum of $30.60 charged for taxes is a proper charge against said estate and is allowed.

8 It is therefore ordered, adjudged, and decreed that the said account of said Thomas Jack, administrator as aforesaid, be allowed and finally settled as follows:

Amount paid for obtaining titles	$25 00
Amount paid for taxes	30 60
Amount allowed to administrator for services	100 00
Total	$155 60

The said estate has been fully and fairly conducted and administered, and that after payment of above amount and the sum of $11.75 clerk's fees said estate is in a condition to be closed.

Done in open court this 4th day of February, A. D. 1888.

ELIAS A. SMITH,
Probate Judge.

Filed in the clerk's office, probate court, Feb'y 4th, 1888.

JOHN C. CUTLER,
Clerk of Salt Lake Co., U. T.

9 (Title of Court and Cause.)

To the honorable the probate court of Salt Lake county:

Your petitioner represents to this honorable court that an order having been this day made settling the final account of Thomas Jack, administrator of the estate of said Thomas Cope, deceased, said estate is now in such condition that the residue thereof can be distributed to the persons entitled thereto; that your petitioner is a son of said Thomas Cope, deceased, and an heir to his estate, and is desirous of having a distribution of said estate made.

Wherefore your petitioner asks that after due notice given of a time and place for hearing this application an order be made distributing the residue of the said estate to the persons entitled thereto.

GEORGE H. COPE,
Per C. O. WHITTEMORE,
His Attorney.

Filed in the clerk's office, probate court, Feb'y 4th, 1888.
JOHN C. CUTLER,
Clerk of Salt Lake County.

TERRITORY OF UTAH } ss:
County of Salt Lake, }

I, John C. Cutler, clerk of the probate court in and for the county of Salt Lake, in the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of petition of Thos. H. Cope for distribution, petition of Geo. H. Cope for distribution, order appointing time and place to hear proof of publication of order to show cause, proof of posting notice and the endorsements thereon, also transcript of register "A" and "B," in the matter of the estate of Thomas Cope, deceased, as appears of record and file in my office.

In witness whereof I have hereuuto set my hand and [SEAL.] affixed the seal of said court this 28th day of May, A. D. 1889.

JOHN C. CUTLER,
Probate Clerk.

10 (Title of Court and Cause.)

Decree of Distribution.

George H. Cope, son of Thomas Cope, deceased, having heretofore, to wit, on the 4th day of February, 1888, filed in the court his petition setting forth, among other things, that the final account of Thomas Jack, administrator of said estate of Thomas Cope, deceased, had been settled, and that the said estate was in a condition to be closed; that a portion of said estate remained to be distributed among those entitled thereto; that he was a son of said Thomas Cope, deceased, and an heir to said estate, and praying that distribution of said estate be made;

And Janet Cope, widow, and Thomas H. Cope, the son, of said Thomas Cope, deceased, having filed in this court their written objection to any of said estate being distributed to said George H. Cope and denying that said George H. Cope was an heir to the estate of Thomas Cope, and praying that distribution of said estate be made to them, said matter coming on regularly to be heard on this 1st day of March, 1889, at 10 o'clock a. m., the said George H. Cope appearing by his counsel, C. O. Whittemore, Esq., and the said Janet Cope and said Thomas H. Cope appearing by their counsel, I. M. Waddell, Esq., this court proceeded to a hearing of this matter; and proof having been made to the satisfaction of the court that due notice had been given of the hearing of said petition, as required by law and the order of this court;

And it appearing to the court, from the proof made in open court, that the said Janet Cope was the legal widow and the said Thomas H. Cope was the legitimate son of said Thomas Cope, deceased, and that the said George H. Cope was the son of said Thomas Cope, de-

ceased, and one Margaret Cope, the plural or polygamous wife of said deceased, and that the marriage of said Thomas Cope, deceased, with said Margaret Cope was contracted when the said Janet was the living and undivorced wife of said Thomas Cope, deceased; that the said Thomas Cope, deceased, died in Salt Lake City, Salt Lake county, in the Territory of Utah, on or about the — day of
11 August, 1864, leaving estate consisting of the real and personal property hereinafter described, the title to which is held by Thomas Jack, administrator of the estate of Thomas Cope, deceased, in trust for the heirs of said estate; that the same is now ready for distribution, and that said estate is now in a condition to be closed; that the whole of said estate was the separate property of said deceased—

The court finds that George H. Cope aforesaid is the son of an issue of the polygamous marriage of said Thomas Cope; that he is not an heir of said deceased, Thomas Cope, nor entitled to any share in the distribution of his estate.

The court further finds that said Janet Cope is the legal widow and that said Thomas H. Cope is the legitimate son of said Thomas Cope, deceased, and that they are the sole heirs of the estate of said deceased, and are therefore entitled to have said estate distributed to them; that the real estate of said estate herein distributed is described as follows, to wit:

All of lot five (5), in block three (3), and all of lot two (2), in block fourteen (14), all as platted in plat "B," Salt Lake City survey, situated in the city and county of Salt Lake, Utah Territory; also lot sixteen (16), in block eighteen, as platted in the five-acre plat "A," big field survey, lying within the limits of the southwest quarter of section eight (8), in township one (1) south of range one east, Salt Lake meridian, situated in Salt Lake county, Utah Territory.

It is therefore hereby ordered, adjudged, and decreed that all and singular the real estate hereinbefore described be, and the same is hereby, distributed in fee to the said Janet Cope and the said Thomas H. Cope in equal undivided shares, and the same Thomas Jack, administrator of the estate of Thomas Cope, deceased, is hereby discharged from all further duties as such administrator and trustee.

Done in open court this 1st day of March, 1889.

JOHN A. MARSHALL, *Judge.*

Filed March 1st, 1889. John C. Cutler, probate clerk, Salt Lake Co. Recorded F. 2, 633 to 635.

12 (Title of Court and Cause.)

Notice of Appeal.

You will please take notice that George H. Cope, who is one of the heirs of the estate above named, hereby appeals to the third district court of Utah Territory from the order and decree of distribution of said estate made and entered in said probate court on the first day of March, 1889. This appeal is taken on questions of both law and fact.

Respectfully,

C. O. WHITTEMORE,
Attorney for George H. Cope.

To the judge and clerk of the probate court of Salt Lake county, Utah, and I. M. Waddell, Esq., attorney for Thomas H. Cope and Janet Cope.

Endorsed: Due service of copy of within notice admitted this 23d day of April, 1889. I. M. Waddell, attorney for George H. and Janet Cope. Filed in the clerk's office April 25, 1889. John C. Cutler, clerk of the probate court, Salt Lake county, Utah.

13 (Title of Court and Cause.)

Undertaking on Appeal.

Whereas George H. Cope, claiming to be one of the heirs of the estate of Thomas Cope, deceased, has appealed to the third district court of Utah Territory from an order and decree made and entered in said probate court on the 1st day of March, 1889, distributing the real property belonging to said estate to Thomas H. Cope and Janet Cope equally and excluding said George H. Cope from a distributive share of said estate:

Now, therefore, in consideration of said premises and of such appeal, we, the undersigned, residents of Utah Territory, to wit:

Elizabeth Showell and Sarah L. Whittemore, of the city and county of Salt Lake, Territory aforesaid, in the sum of three hundred dollars, do jointly and severally undertake and promise, on the part of the appellant, that said appellant will pay all damages and costs which may be awarded against him on the appeal, on a dismissal thereof, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves, our heirs, executors, and administrators, jointly and severally bound.

And whereas said George H. Cope is desirous of staying the execution of said order so appealed from, we do further, in consideration thereof, jointly and severally undertake and promise and so acknowledge our heirs, executors, and administrators bound in the further sum of — dollars, being the amount for that purpose fixed by the judge of this court, that during the possession of said property by the administrator of said estate said administrator will not commit nor suffer to be committed any waste thereon, and that if said order be affirmed or the appeal dismissed said appellant will pay to the parties entitled thereto the value of the use and occupation of the property of said estate from the time of the appeal until the delivery of the possession thereof, not exceeding the said sum of — dollars.

In witness whereof we have hereunto set our hands and seals this 25th day of April, 1889.

G. H. COPE. [SEAL.]
ELIZABETH SHOWELL. [SEAL.]
SARAH L. WHITTEMORE. [SEAL.]

14 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Elizabeth Showell and Sarah L. Whittemore, being duly sworn,

each for herself says: I am a resident of Salt Lake county, Utah, and a freeholder therein. I am worth the sum of three hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

ELIZABETH SHOWELL.
SARAH L. WHITTEMORE.

Subscribed and sworn to before me this 25th day of April, 1889.

[SEAL.] C. O. WHITTEMORE,
Notary Public.

Filed April 26th, 1889.

JOHN C. CUTLER,
Probate Clerk, Salt Lake Co.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

I, John C. Cutler, clerk of the probate court in and for the county of Salt Lake, in the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of report and account of Thomas Jack, administrator; decree allowing final account, decree of distribution, notice of appeal, bond on appeal with endorsements thereon, as appears of file and record in my office.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court this 25th day of May, A. D. 1889.

JOHN C. CUTLER,
Probate Clerk.

Endorsed: Transcript on appeal. Filed June 13th, 1889. Henry G. McMillan, clerk.

15 In the District Court of the Third Judicial District, Territory of Utah.

In the Matter of the Estate of THOMAS COPE, Deceased.

An appeal from the probate court of Salt Lake county.

It is hereby stipulated that the facts as stated and found in the decree of distribution made and entered by said probate court on the 1st day of March, 1889, are, and shall be taken to be, the facts in this case, and that the sole question to be determined in this case is whether the said George H. Cope mentioned in said decree as the legitimate child of Thomas Cope, deceased, is an heir of said deceased, and as such entitled to share in the distribution of the estate of said deceased, and that the value of said estate is more than fifteen thousand dollars, of which the said George H. Cope claims one-half.

The conclusions of law drawn from said facts by said probate

court that said George H. Cope is not such heir and not entitled to inherit any portion of the estate of said deceased is alone in dispute.

S. P. ARMSTRONG AND
WM. C. HALL,
Attorneys for George H. Cope.
JOHN M. ZANE AND
J. L. RAWLINS,
Attorneys for Janet Cope and Thomas H. Cope.

Dated Nov. 13, 1889.

Endorsed: Filed Nov. 13, 1889. Henry G. McMillan, clerk, by Fergus Ferguson, deputy.

16 (Title of Court and Cause.)

This cause having been heretofore tried before the court, and C. O. Whittemore and S. P. Armstrong having appeared for plaintiff and Le G. Young and J. M. Zane for defendants, and the court having heard the evidence and the proofs, and being fully advised thereon, files now its findings of fact as follows, to wit:

1. That Thomas Cope, deceased, died at Salt Lake county, Utah Territory, intestate, on the — day of August, 1864, leaving real estate therein consisting of the following parcels of real estate, to-wit: All of lot five (5), in block three (3), plat "B," Salt Lake City survey; all of lot two (2), in block fourteen (14), plat "B," Salt Lake City survey; all of lot sixteen (16), in block eighteen (18), as platted in five-acre plat "A," big field survey, lying within the limits of the southwest quarter of section eight (8), in township (1) south of range one (1) east, Salt Lake meridian, said three parcels being in Salt Lake county, Utah Territory.

2. That said Thomas Cope left at the time of his death surviving him Janet Cope, his lawful wife; Thomas H. Cope, his only legitimate son, and George H. Cope, his illegitimate son by Margaret Cope, his polygamous or plural wife, and that the marriage of the said deceased with Margaret Cope was contracted while the said Janet Cope was the living and undivorced wife of the said deceased.

And as conclusions of law the court finds—

1. That the sole heirs-at-law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope and are alone entitled to share in the distribution of the estate of said Thomas Cope, and that all the real estate above mentioned descended to and vested in said Janet Cope and Thomas H. Cope, subject to the administration upon said estate.

2. That the said George H. Cope is not an heir of said Thomas Cope, deceased, and is not entitled to any share of said Thomas Cope's estate.

Dated January 22d, 1890.

T. J. ANDERSON, *Judge.*

Endorsed: 7806. In matter of the estate of Thomas Cope, deceased. Findings. Filed January 22d, 1890. Henry G. McMillan, clerk.

17 (Title of Court and Cause.)

This cause having been regularly tried before the court, and the court having made and filed its findings of fact and conclusions of law in writing, from which it appears that Thomas Cope died at Salt Lake county, Utah Territory, intestate, on the — day of August, 1864, leaving as his only heirs-at-law Janet Cope and Thomas H. Cope, and that George H. Cope is not an heir of said Thomas Cope, deceased, and that said deceased died owning at the time of his death the real estate hereinafter mentioned: Now, then, upon motion of Messrs. Le Grand Young and John M. Zane, attorneys for defendants, it is ordered, adjudged, and decreed that the said Janet Cope and Thomas H. Cope are entitled to and are the owners of the real estate below mentioned, and that said George H. Cope is not entitled to and is not the owner of and has no right or claim to or estate in any portion of the real estate below mentioned; that the description of the said real estate is as follows: All of lot two (2), in block fourteen, plat "B," Salt Lake City survey; all of lot five (5), in block three (3), plat "B," Salt Lake City survey; all of lot sixteen (16), in block eighteen (18), five-acre plat "A," big field survey, within the limits of the southwest quarter of section eight (8), in township one (1) south, of range one (1) east, Salt Lake meridian, said three parcels being in Salt Lake county, Utah Territory, and that defendants recover costs at $13.25.

Dated January 22d, 1890.

T. J. ANDERSON, *Judge.*

Attest:

[SEAL.] HENRY G. McMILLAN, *Clerk.*

Endorsed: Filed January 22d, 1890. Henry G. McMillan, clerk.

18 In the District Court of the Third Judicial District, Territory of Utah.

In the Matter of the Estate of THOMAS COPE, Deceased, GEORGE H. COPE, Appellant,
vs.
JANET COPE and THOMAS H. COPE, Defendants and Respondents.

Notice of Appeal, No. 7806.

To the clerk of said court, the said defendants, and Messrs. Le Grand Young and John M. Zane, attorneys for defendants:

Take notice that said plaintiff appeals to the supreme court of Utah Territory from the judgment and conclusions of law and the whole thereof entered and rendered in the above-entitled action in

favor of said defendants and against said plaintiff on the 22d day of January, 1890.

Dated February 11, 1890.

C. O. WHITTEMORE AND
S. P. ARMSTRONG,
Attorneys for Plaintiff.

Endorsed: Notice of appeal. Service of notice admitted February 11, 1890. Le Grand Young. Filed February 11, 1890. H. G. McMillan, clerk, by Fergus Ferguson, deputy.

19 (Title of Court and Cause.)

Undertaking on Appeal.

Whereas George H. Cope, claiming to be a legal heir of the estate of Thomas Cope, deceased, has appealed to the supreme court of the Territory of Utah from the order, judgment, and decree made and entered in the said district court on the 22d day of January, 1890, ordering, adjudging, and decreeing Janet Cope and Thomas H. Cope to be entitled to and the owners of certain real estate in said decree described, and that George H. Cope is not entitled to nor the owner of and has no right or claim to or estate in any portion of said real estate:

Now, therefore, in consideration of said premises and of such appeal, we, the undersigned, residents of Utah Territory, to wit, George H. Cope, as principal, and Elizabeth Showell and Sarah L. Whittemore, of the city and county of Salt Lake, Territory of Utah, as sureties, in the sum of three hundred dollars, do jointly and severally undertake and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves, our heirs, executors, and administrators, jointly and severally, bound by these presents.

And whereas said George H. Cope is desirous of staying the execution of said order so appealed from, we do further, in consideration thereof, jointly and severally undertake and promise and so acknowledge our heirs, executors, and administrators bound in the further sum of — dollars, being the amount for that purpose fixed by the judge of this court, that during the possession of said property by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment or order, not exceeding the sum of — dollars.

20 In witness whereof we have hereunto set our hands and seals this 11th day of February, 1890.

GEORGE H. COPE. [SEAL.]
ELIZABETH SHOWELL. [SEAL.]
SARAH L. WHITTEMORE. [SEAL.]

TERRITORY OF UTAH, } ss :
County of Salt Lake, }

Elizabeth Showell and Sarah L. Whittemore, being duly sworn, each for herself says: I am a resident of Salt Lake county, Utah Territory, and a freeholder therein. I am worth the sum of three hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

ELIZABETH SHOWELL.
SARAH L. WHITTEMORE.

Subscribed and sworn to before me this 11th day of February, 1890.

[SEAL.] S. P. ARMSTRONG,
Notary Public.

Filed February 12th, 1890.

H. G. McMILLAN, *Clerk,*
By FERGUS FERGUSON, *Deputy.*

We hereby certify that the foregoing is a true & correct copy of the record or judgment-roll in the district court of the 3rd judicial district in the case therein entitled and of the notice of appeal. We also certify that an undertaking on appeal in due form has been properly filed therein.
Dated April 3, 1890.

C. O. WHITTEMORE,
Att'y for Appellant.
JNO. M. ZANE,
Att'y for Respondent.

21 In the Supreme Court of the Territory of Utah: June Term, 1890.

THURSDAY, *June 5th, A. D.* 1890.

Present and presiding, all the justices thereof.

In the Matter of the Estate of THOMAS COPE, Deceased, GEO. H. COPE
vs.
JANET COPE *et al.*

From Third District.
Before Thos. J. Anderson, Judge.

This cause coming on regularly for hearing was argued by John W. Judd, for appellants.
Anderson, A. J., not sitting in this hearing; Zane, C. J., having been of counsel, not sitting.

FRIDAY, *June 6th, A. D.* 1890.

Present and presiding, all the justices thereof.

In the Matter of the Estate of THOMAS COPE, Deceased, GEO. H. COPE, Appellant,
vs.
JANET COPE *et al.*, Respondents.

This cause was further argued by John M. Zane, Esq., on behalf of respondents, by C. S. Varian through permission of the
22 court heretofore granted, by J. G. Sutherland on behalf of appellant, and petitioner was submitted and taken under advisement.

Anderson, A. J., not sitting in this hearing; Zane, C. J., not sitting, having been of counsel.

MONDAY, *July 28th, A. D.* 1890.

Present and presiding, all the justices thereof.

In the Matter of the Estate of THOMAS COPE, Deceased, GEO. H. COPE, Appellant,
vs.
JANET COPE *et al.*, Respondents.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, Blackburn, J., dissenting, that the judgment of the district court therein be, and is hereby, affirmed.

Thereupon counsel of appellant prays the allowance of an appeal from the judgment of this court rendered herein to the Supreme Court of the United States, and asks that the amount of a bond to be given thereon be now fixed; whereupon it is ordered that
23 said appeal be, and is hereby, allowed, and the amount of a bond to be given thereon is fixed at $300.

Counsel of appellant further asks that this court adopt the findings of fact made by the district court as the findings of this court to accompany the record to the Supreme Court of the United States; counsel for respondents objecting thereto, — was taken under advisement.

TUESDAY, *July 29th, A. D.* 1890.

Present and presiding, all the associate justices thereof.

In the Matter of the Estate of THOMAS COPE, Deceased, GEORGE H. COPE, Appellant,
vs.
JANET COPE *et al.*, Respondents.

In this cause it is ordered that the findings of fact made by the district court therein be, and the same are, adopted by this court to accompany the record on an appeal heretofore allowed in this cause to the Supreme Court of the United States.

24 In the Supreme Court of the Territory of Utah. June Term, 1890.

In the Matter of the Estate of THOMAS COPE, Deceased, GEORGE H. COPE, Appellant,
vs.
JANET COPE and THOMAS H. COPE, Respondents.
} From Third District. Before T. J. Anderson, Judge.

Appearances: Sutherland & Judd and C. O. Whittemore & S. P Armstrong, attorneys for appellant; Le Grande Young & John M. Zane, attorneys for respondents.

HENDERSON, *J.*:

The questions in this case are the same as those in the case of the estate of George Handley, deceased, in which opinions have just been handed down. The cause was heard in the district court by Justice Anderson, and Chief Justice Zane was of counsel, as will be seen by the opinions just handed down in the Handley case. We are unable to agree, and therefore the judgment of the court below is affirmed.

(Signed) HENDERSON, *J.*
BLACKBURN, *J.*

Marked: Filed July 28th, 1890.

JOS. P. BACHE, *Clerk.*

25 By the Honorable Charles S. Zane, chief justice of Utah.

To Janet Cope and Thomas H. Cope and to Le Grand Young and John M. Zane, their attorneys, Greeting:

Whereas George H. Cope has lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, the said Janet Cope and Thomas H. Cope, and has filed the security required by law, you are therefore hereby cited and admonished to be and appear before the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, this 25th day of August, A. D. 1890.

C. S. ZANE,
Chief Justice of Utah Territory.

Due service of a copy of the above citation admitted.
JNO. M. ZANE AND LE GRANDE YOUNG,
Attorneys for Def't in Error.

26 [Endorsed:] Supreme court of Utah. File No. 88. Geo. H. Cope, appellant, *vs.* Janet Cope and Thos. H. Cope. Citation. (Original.) Filed Aug. 25, 1890. Jos. P. Bache, clerk supreme court Utah.

27 Know all men by these presents that we, J. W. Judd and C. O. Whittemore, both of the city and county of Salt Lake and Territory of Utah, are held and firmly bound unto Janet Cope and Thomas H. Cope, their heirs, executors, administrators, or assigns, in the full and just sum of three hundred dollars ($300), lawful money of the United States of America, to be paid to the said Janet Cope and Thomas H. Cope, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 14th day of August, A. D. 1890.

Whereas lately, at a term of the supreme court of the Territory of Utah, on the 28th day of July, A. D. 1890, of said term, in a suit depending between George H. Cope as appellant and the said Janet Cope and Thomas H. Cope as respondents, judgment was rendered against the said appellant and in favor of the said respondents, and the said appellant having obtained the allowance of an appeal from said judgment rendered in the supreme court of Utah to the Supreme Court of the United States to reverse the said judgment
28 in the aforesaid suit, and a citation directed to the said respondents and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next:

Now, the condition of this obligation is such that if the said appellant shall prosecute the said appeal to effect and answer all damages and costs if *they* fail to make *their* said plea good, then the above obligation to be void; else to remain in full force and virtue in law.

(Signed) J. W. JUDD. [SEAL.]
C. O. WHITTEMORE. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOS. P. BACHE.

Approved as to form and sufficiency of sureties this 25 day of August, A. D. 1890.

JOS. P. BACHE,
Clerk Supreme Court of Utah Territory.

[Endorsed:] Supreme court of Utah. File No. 88. George H. Cope *vs.* Janet Cope *et al.* Bond on appeal. (Copy.) Approved Aug. 25, 1890. Filed Aug. 25, 1890. Jos. P. Bache, clerk.

29 UNITED STATES OF AMERICA, *Territory of Utah,* } *ss:*

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of George H. Cope, appellant, *vs.* Janet Cope and Thomas H. Cope, respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, and bond on appeal, together with the original citation, all in and of said court and cause, to the Supreme Court of

the United States; and I do hereby certify that said attached transcript of said record and proceedings, opinion, and bond is a full, true, and correct copy of the several originals thereof on file or of record in my office.

Seal Supreme Court Territory of Utah, United States of America.

In witness whereof I, hereunto set my hand and affix the seal of the supreme court of Utah Territory this 28th day of August, A. D. 1890, at Salt Lake City, Utah.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Utah Territory supreme court. No. 1327. George H. Cope, appellant, *vs.* Janet Cope and Thomas H. Cope. Filed September 29, 1890.

Of. Supreme Court, U. S.
FILED.
DEC 3 1890
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1327.

GEORGE H. COPE, APPELLANT,

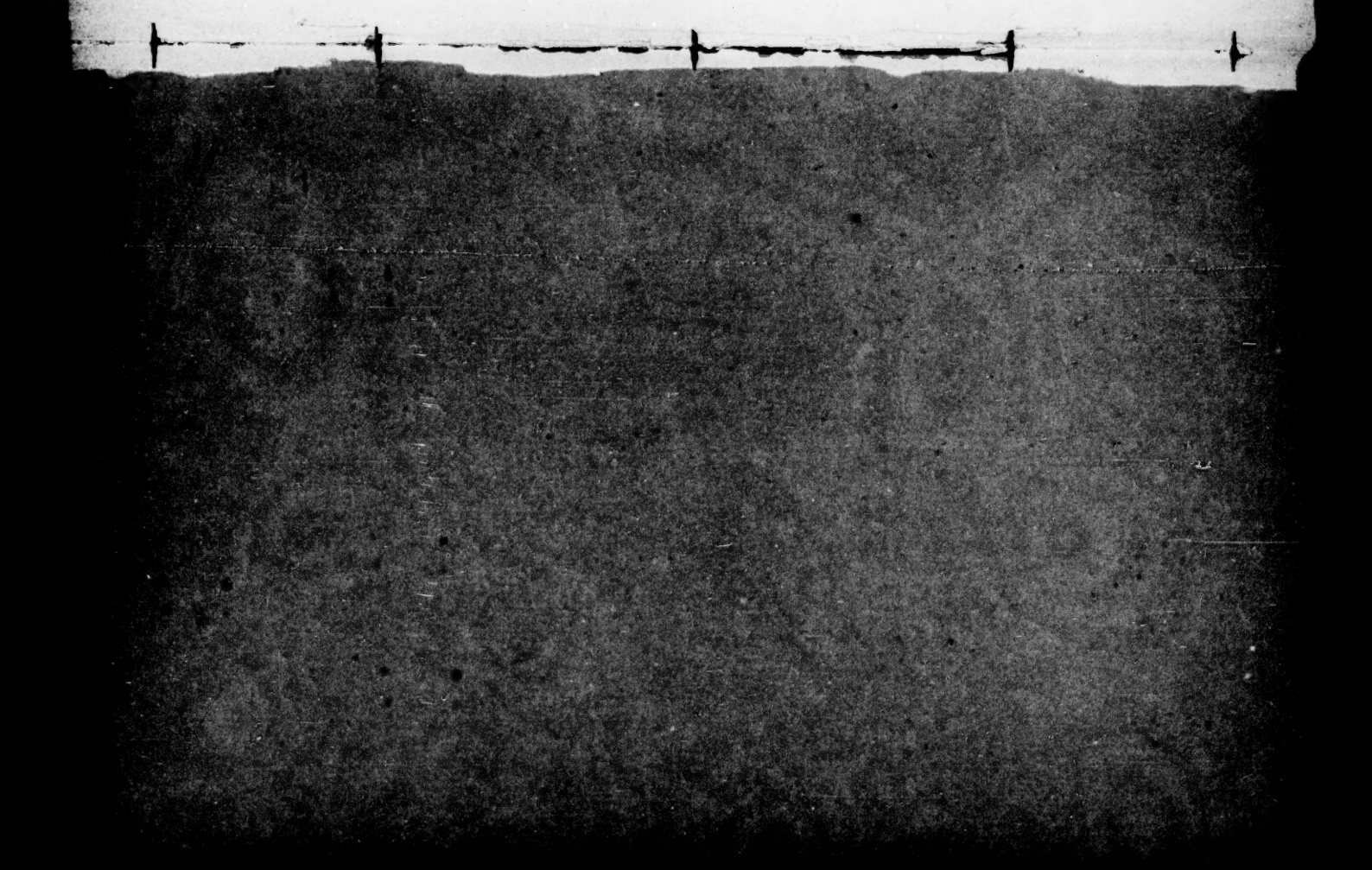
vs.

JANET COPE ET AL.

BRIEF FOR APPELLANT.

J. G. SUTHERLAND,

Attorney for Appellant.



IN THE

Supreme Court of the United States.

ESTATE OF THOMAS COPE, Deceased.

GEORGE H. COPE,
Appellant.
vs.
THOMAS H. COPE,
and JANET COPE,
Respondents.

BRIEF FOR APPELLANT.

Thomas Cope died intestate, August 22, 1864, leaving a widow, Janet Cope, and two sons, George H. and Thomas H. Cope, the former by a polygamous wife and the latter by his lawful.

In the distribution of the decedent's estate, George H. Cope, the appellant, was excluded from the inheritance and the whole estate decreed to Janet Cope, the widow, and her son, Thomas H. Cope, the respondents. The estate is of the value of fifteen thousand dollars.

There is no controversy as to these facts; they were found pursuant to a stipulation.

A territorial statute, regulating the succession of intestate estates, was enacted in 1852, in Utah, which continued in force until after the death of Thomas Cope.

The following are two sections of the Act:

"Sec. 24.—The homestead occupied by the wife, or any portion of the family of the deceased at the time of his death, shall in all cases be held free to the use of the wife and family of the deceased, and shall not be liable to any claim or claims against said estate; and if there be any other property remaining after the liabilities of the estate are liquidated, then it shall, in the absence of other arrangements by will, descend in equal shares to his children or their heirs, one share to such heirs through the mother of such children, if she shall survive him, during her natural life, or during her widowhood; or if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the living and the heirs of those who are dead, such heirs taking by the right of representation."

Sec. 25.—Illegitmate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided, it shall be made to appear to the satisfaction of the Court that he was the father of such illegitimate child or children."

Compiled Laws of Utah, of 1876, p. 268.

By the final decree of the Probate Court, the estate was apportioned wholly to the respondents, and the appellant excluded on the ground of illegitimacy. On appeal to the Third District Court, this decree was affirmed. On appeal from that affirming judgment, the Supreme Court, consisting of a quorum of two judges, was equally divided, and therefore, ordered that the judgment below be affirmed.

I contend that George H. Cope was entitled under the provisions of the Utah statutes, which are above quoted, to one-half of the estate of his father, and the decree or judgment of the court denying his rights so to inherit is erroneous.

I. *The statute of 1852, providing that illegitimate children shall inherit from the father in like manner as legitimate, is valid.*

The legislative assembly has a general power to legislate on rightful subjects. Regulating the succession of decedent estates is such a subject. This statute was valid when it was passed and con-

tinued valid until it was superseded by the Territorial act of 1876 on the same subject.

The contention below, affirmed by the decree appealed from, was that the p.ovision in favor of illegitimates was abrogated by the Anti-Polygamy Act of 1862. Whether this contention is sound is the only question on this appeal. 12 U. S. St. at L.

The second section of that act annuls by title the ordinance for the incorporation of the Mormon Church, and then adds:

"And all other acts or parts of acts heretofore passed by the Legislative Assembly of the Territory of Utah, which establish, support, maintain' shield or countenance polygamy, be and the same hereby are disapproved and annulled: provided, that this act shall be so construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right to worship God according to the dictates of conscience, but only to annul all acts which establish, maintain, protect or countenance the practice of polygamy, etc."

The power to "annul" territorial acts was reserved by Congress in the Organic Act, but it had this power without reserving it.

National Bank vs. County of Yankton, 101 U. S., 129.

It is another name for the power of repeal. A territorial act operates until annulled, and when annulled, ceases from that time, as though repealed. Though Congress has a superior power to legislate for territories, its annulling power is no more nor less than repeal, and this power the territorial legislature has in the same measure in respect to its own legislation.

My contention is that Congress did not intend, by the several provisions just stated, to annul the law allowing illegitimate children to inherit; the language can not be so interpreted as to have that effect.

Territorial acts are reported to Congress, and that body is presumed to be as familiar with such legislation as with its own.

When it disapproves of a Territorial act, it should be done as explicitly as when it repeals existing acts of Congress. It identified the ordinance for incorporating the Church and directly an-

nulled it so far as it purported to establish or maintain polygamy. The general words which follow merely declare the self-evident result of the first section—that such local legislation is annulled as professes, or was intended in effect to establish, keep up or justify the institution which that section was intended to destroy.

It is admissible for Congress, as well as any other legislative body, shirking the labor of looking through the laws, to see what existing provisions are out of harmony with their express legislation, to provide in a general way that all inconsistent acts and parts of acts are repealed. But as was said by Chief Justice Lowrie:

"Any lawyer who stops to look at this last repealing clause will see that it is merely the expression of the degree of repeal that is involved and implied in every new statute; it repeals all previous inconsistent legislation, and nothing more. We need not stop to prove this. It adds nothing to the previous parts of the statute; that is not involved in them, and it is entirely a useless provision to the legal mind, though it is no doubt valuable to others, and is, therefore, often inserted at the end of statutes. Much more often it is not. But whether expressed or implied, the interpretation of the statute is the same."

The Hickory *vs.* Free Road, 43 Pa. St., at p. 142.
People *vs.* Anderson, 20 Cal., 94.

By the first section of the act of 1862, Congress defined polygamy as a crime and affixed a penalty, and thereby, by necessary implication, prohibited it.

Hallet *vs.* Norion, 14 John, 273.

The repeal in the second section is strictly limited by its terms to the repeal, which would be implied from the prohibition of polygamy contained in the first section.

The ordinance for the incorporation of the Church is not annulled absolutely. The proviso is that this act shall be "so *limited* and construed" as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor, etc., "*but only to annul all acts and laws which establish,*

maintain, protect or countenance the practice of polygamy," etc. The first section prohibited such marriages. That prohibition would make void all laws which directly or impliedly permitted or justified polygamy.

The second or repealing section is thus carefully limited to express the same repeal; it aimed only to take away the legal supports of polygamy.

That statute, by making polygamy a crime, not only repealed all inconsistent laws, but necessarily prohibited the enactment, in the future, by the Territorial Legislature of any law inconsistent with it. So long as Congress prohibits polygamy it prohibits any territorial legislation to neutralize that prohibition; it prohibits any territorial law which shall purport to make polygamy lawful.

II. No territorial law was annulled by the general words of section two, unless it applied to polygamy, and assumed it to be lawful or professed to make it so.

This is the natural or grammatical reading of that annulling clause.

Such must necessarily be the effect of any *law* "to establish, maintain, support or countenance" it. It must be a law couched in such terms and capable of such practical effect that, if valid, it will be a shield to the polygamist if prosecuted for the offense. In other words, to fill that description, and operate with that effect or tendency, it must relate to that subject, and if valid, avail as a justification.

The annulling clause is a repeal by implication, and does not displace any legislation except to the extent of unavoidable repugnancy.

McCool *vs.* Smith, 1 Black, 495.
U. S. *vs.* 67 Packages, 17 How., 85.
U. S. *vs.* Walker, 22 Id., 299.
Bowen *vs.* Leise, 5 Hill. 221.
People *vs.* St. Lawrence Co., 103 N. Y., 541.
Looker *vs.* Brookline, 15 Pick., 343.

McAfiee *vs.* R. R. Co., 36 Miss., 669.
Naylor *vs.* Field, 29 N. J. L., 287.
Walters App. 70 Pa. St., 393.
Goodrich *vs.* Milwauxee, 24 Wis., 422.
Wood *vs.* U. S. 16 Pet., 342.
McCool *vs.* Smith, 1 Black, 459.
Beals *vs.* Hale, 4 How., 37.
Furman *vs.* Nickol, 8 Wall.
Fx parte Vérger Id., 85.
U. S. *vs.* Henderson, II. Id. 652.
Clay Co. *vs.* Society, 104 U. S. 579.
Louisiana *vs.* Taylor, 105 U. S. 454.
Red Rock *vs.* 106 Id., 595.
Ex parte Crow Dog 108 Id., 556.
Chew Heong *vs.* U. S., 11 Id., 536.

If two acts passed at different times can both stand, have the effect intended by the Legislature, without inconsistency or contradiction, the last will not repeal the other. This is elementary, and no lawyer will dissent from it.

It is equally clear that a law of succession which entitles an illegitimate child to inherit from the father, may be carried into effect, without impugning the enactment that polygamy is a crime. The Territorial Legislature might pass an act of two sections, the first defining polygamy and prescribing a severe penalty, and the second providing for the relief of the offspring. One section would not nullify the other.

It is enough to prevent a repeal by implication that the prohibition of polygamy is not also a prohibition of aid to polygamous children.

Legislation favorable to polygamous children is not legislation favorable to polygamy. There is no repugnance between legislation that polygamy is a crime and that favoring in any way polygamous offspring. Congress has embraced provisions of both kinds twice in one and the same act. If it is said that Congress, being the supreme legislature, has the power to enact such inconsisten-

cies; we say, nay. It is beyond even the power of Omnipotence to make contradictions harmonize.

We claim under legislation which relates to another subject, not polygamy; to other persons, not polygamists; we claim the right to inherit, not as a concession to polygamy, but by a law which is compatible with a denunciation of it.

The annulling words in question do not affect statutes enacted upon a rightful subject of legislation and for a purpose consistent with polygamy being declared a crime, and which can have their full operation without affording any legal sanction of polygamy.

No law will be declared void for its secondary tendencies or remote effects. The direct and immediate or proximate results of a statute are alone to be considered. A broad field of casuistry would be opened to capricious speculation if the validity of a statute could be judicially determined on any such shadowy reasoning.

When the law authorizes an inquiry for results from a given cause, or for the cause of known results, to hold such cause responsible, the inquiry is confined to the immediate or proximate cause or effect; the maxim is "*In jure non remota causa sed proxima spectatur.*"

Bumpus *vs.* Planter, 1 John Ch., 209.
Rice *vs.* Homer, 12 Mass., 234.
Broom Max.

No court would feel justified to grope far in the dark to find reasons for denying a person relationship to his own parents, or for depriving him of the benefits of that relationship, because they sinned in begetting him.

The policy of the government is not a judicial question except when the government by the legislature has declared it.

It has declared a policy adverse to polygamy by defining it as a crime; so far the courts are bound to recognize it. They will construe that statute like all criminal statutes, strictly; but when a case is plainly brought within it, they know its policy is identical with the intent of the act—no other.

If it is contended that it is the policy of the government to discourage the commission of the crime by extending a part of the punishment to the offspring, we say, yes, that is so as to children born since a year after the enactment of the Edmunds-Tucker Act, for the national legislature has said so.

If it is contended that there was such a policy before, we reply that Congress had not said so in any previous act, but the contrary.

In the absence of any direct avowal of its policy, no conjectures are admissable, even for the purpose of aiding in the construction of statutes confessedly valid, and less to spell out a reason for holding a statute invalid.

In Hadden *vs.* The Collector, 5 Wall. 118, this Court said:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is ground much too unstable upon which to rest the judgment of the court in the interpretation of the statutes."

In Municipal Building Society *vs.* Kent L. R., 9 App. Cas., 273, the Court said: "It is never very safe ground in the construction of a statute to give weight to views of its policy which are themselves open to doubt and controversy."

To the same effect are:

Pool *vs.* Wedemeyer, 56 Tex., 287.
Coffin *vs.* Rich, 56 Mo., 507.
Bodley *vs.* Mattingly, 14 B. Mon., 39.
Ruthmeyer *vs.* People, 44 Mich., 280.
People *vs.* Draper, 15 N. Y., 545.
People *vs* Shepard, 36 N. Y., 290.

It is to be observed that the provision in question allowing illegitimate children to inherit, is not confined to children of polygamy. Hence the act of 1862, which applies only to polygamy, does not extend to all the sexual sins of which illegitimate offspring is the result. There is no ground for saying that the law pro-

hibiting polygamy forbids, by implication, other sexual immoralities, or imposes a restraint on territorial legislation to prevent the passage of laws to legitimate the children of sin, or to give them the right to inherit.

Laws which are to be strictly construed cannot be held void as to some applications and held valid as to others, where both are equally within the letter and purpose

There are several cases in this court which illustrate this principle. They are reviewed, and the principle applied in Baldwin vs. Frank, 120 U. S., 578.

III. Statutes which enact things which are odious are strictly construed; they will not be extended in that direction by inference, nor beyond what their plain letter requires.

Mr. Bishop says: "There are things which the law deems odious; not as being unnecessary, but in a sense in which a father feels it odious to inflict needful chastisement on a child; and, on the other hand, there are things in which the law delights. To things odious is applied the strict construction; to things favored, liberal."

Bish. on W. L., §192.

The State is *parens patria* to all the members which constitute it. If it is a thing odious for a father to chastise his guilty son, how much more odious for the State to chastise one for the transgression of another; it is doubly odious And when this injustice is visited upon a numerous class it becomes atrocious.

Statutes for punishment, laying on burdens or imposing disabilities, are strictly construed.

Smith *vs.* Spooner, 3 Pick., 229
Coleman *vs.* Hart, 37 Wis., 180.
Sewell *vs.* Jones, 9 Pick., 412.
Stiel *vs.* Sunderland, 6 H. & N., 796.
Portwardens *vs.* Cartwright, 4 Sandf., 237

York Co. Bank *vs.* Carter, 38 Pa. St., 446.
Wiener *vs.* Davis, 18 Id., 331.
Endlich on St., Sections 341, 345.

"It would be extremely wrong," say the Court in *R. vs. Bond*, "that a man, by a long train of conclusions, be reasoned into a penalty, when the express words of the act of parliament do not authorize it.

1 B. & Ald., at p. 392.

The words of the annulling clause do not require such consequences; they are not within its ostensible purpose or design.

To extend that clause by construction to bring such unmerited chastisement upon polygamous children is to violate the most sacred canons of interpretation.

In the prohibition of polygamy and the repeal of all Territorial acts favoring the institution, it is pretended that there has, been lurking for forty years, until now, undiscovered, the venom of *attainder*—a corruption of blood, not of the polygamist but of his children, despite the healing effect of the statute in force all this time.

Is this Court warranted in extending general language, having reference to another subject, to operate with such odious injustice?

In England, while her criminal law was at the acme of its brutality, a statute made one an accessory who gave meat and drink to a felon, knowing him to be such, but his wife and children were excepted out of it by construction Now, in this humane and enlightened age, it is sought to involve children in the offense of the father by cutting off their meat and drink.

This act of 1852, in its essential features, follows the lead of legislation which is general in this country, differing from it only in details. It is intended to put all children on an equal footing as to heritable rights. If the annulling clause repeals that statute, polygamous children are thereby degraded to the state of *bastards* at common law, to be without father or mother, brothers, sisters or collateral kindred—waifs—unrelated beings, thrust out upon life's

great common by resentful fate to expiate sins which they never committed, while those who are bastards have heritable rights. A statute which works such injustice, by relegating those who are in no social sense bastards, to the obsolete *status* which the common law assigned to the children of sin, should express its malign purpose plainly, or else every court is justified in following the humane spirit which now universally pervades our jurisprudence, and hold there is no such purpose. Such a law would resuscitate a legal condition, purely artificial, that the sad lot of those in it may serve a retributive purpose in regard to others. It would reduce innocent persons to a status which the moral sense of mankind has long since abolished, because it involved gross injustice, and was out of harmony with the axioms of our political system, which is built upon natural equality.

In this Territory, those born out of lawful wedlock, of polygamous parents, are numerous; they will be largely the progenitors of the new State, when it shall, in the fullness of times, be founded. They have been treated socially and otherwise as being upon the same plane with all others in the community.

IV. The annulling clause in question cannot be construed to annul Territorial statutes for favoring polygamy, where such favoring consists only in putting polygamous children on a plane of legal equality with other children.

That clause annuls Territorial acts which support polygamy; that is its scope and purpose. As the provision for illegitimate children in the Territorial law of succession has no relevancy to polygamy except as a polygamous paternity creates such relevancy, a broad proscriptive policy will have to be defined to make it embrace the withdrawal of power from the Territorial Legislature to enact laws for the relief of polygamous children, in order to abrogate this particular law of inheritance. When a limit of legislative power is supposed to be indicated by an implied prohibition in such general words, it will take a wide range if it is ample enough

to annul that law. To compass its abrogation there must be a comprehensive principle of proscription deduced from that annulling clause—one so expansive that, if it can wipe out this law, it must also be fatal to all other laws which conduce in like degree to the welfare of polygamous children.

Congress has not by this clause, or otherwise, singled out this law of succession and arbitrarily annulled it. If it is annulled, it is abrogated for being a law giving illegitimates such equal rights in one particular; and the principle must be so broad and general as to be equally fatal to any other law that would otherwise aid him, by tending to bring him upon the same plane with other persons in the community. The contention of the respondents must be that any and all laws like that allowing a polygamous child to inherit, imply an inadmissible friendliness to their existence and welfare. The logic is and must be that any law that favors such a child as it does one born in lawful wedlock, countenances polygamy. This law of descents must be attacked on a ground broader than that that particular act is annulled; it is attacked on a broader principle, and that it follows therefrom that this act is annulled.

The major proposition must be that territorial laws giving polygamous children equal rights with others, or laws which conduce to their welfare in common with other individuals in the community, "countenances" polygamy, and are therefore annulled; the minor proposition is that the law entitling illegitimates to inherit equally with legitimates is an instance of such obnoxious legislation; therefore it must abide the same fate.

It is only by this comprehensive principle that this act in regard to descents can be brought within the destroying breath of the annulling clause.

The respondents' argument is based on the assumption that the government merely tolerates the existence of polygamous children. That its general laws for the public good are not intended for them. If they starve, polygamy languishes; if they are well fed, "it waxes fat and kicks;" if they are kept in ignorance, polygamy is under a cloud which has "no silver lining;"

that schools which educate its children infuse into it new hope and strength; if they are unprotected and suffer violence, polygamy feels a corresponding hurt; that in their welfare it lives and flourishes; in short, that the interest and fate of polygamy and polygamous children are identical. According to this argument, it is contrary to the policy of Congress that a polygamous child should have property; that he should have any of the priviliges and rights of civil government. It necessarily affirms that the law as to him, aims at deprivation; not merely to handicap him in the race of life, but to divest him of all means of comfort, and to deny him the equal protection of the law. Whether it aims at one or the other; whether it is intended he should have no property, and therefore should not inherit, or would hamper him and make him acquire it in the most difficult ways, the logic of the respondents' position requires him to hold it with all the conclusions that must necessarily follow from a presumed intent broad enough to include not only the abrogation of the law of descent as to such children, but all cognate laws, which are similarly beneficial to him. It obliges them to concede that if the territorial law in favor of such children, with reference to inheritance, is annulled, the same principle which annuls that law annuls every other territorial law which aids them in common with others; that by this annulling legislation, Congress says, as lawmakers, these are detested beings, and whatever contributes to increase their estate, and to promote their temporal welfare, is like the plowing of the wicked, "an abomination unto the Lord."

There are territorial laws under which taxes are levied and distributed on the polls of such children; the law permits them to vote and to hold office; it makes it murder to kill them, larceny to steal from them. The local laws provide for them in all respects in common with the rest of the community. Such laws are necessary for their security and well being.

Are all these statutes annulled? Are all statutes which recognize polygamous children as members of the community and as en-

titled to the equal protection of the law, to be regarded as withdrawn?

The laws in this respect all belong to one catagory. If a polygamous son is related to his father, but may not inherit, because to permit it will countenance polygamy, and a law which purports to give him such a right must be expunged to avoid giving such countenance, then every law which extends such aids to polygamous children as to others, must be regarded in the same light, and share the same fate. By respondents' argument, polygamy must not be countenanced by the prosperity of its children; their misery must be made to curse it and testify against it.

If they are offending members of the body politic why not cut them off. If this annulling provision has the effect contended for by respondents, are not such children victims of outlawry; in the fullest sense?

A law allowing them to inherit countenances polygamy no more than the law which authorizes a will devising property to them or a law which holds another bound by his contract with them; or a law which permits them to share the benefits of schools supported by public funds.

If one law on a rightful subject of legislation, the primary purpose of which is to promote the general welfare, and only including the welfare of polygamous children, as it includes the welfare of all others, is annulled by inference arising from the consideration that a benefit conferred on such children is a countenance of polygamy, then are all laws of like effect and tendency are annulled; annulled as to them.

It must be manifest that, a construction which involves and necessitates such wholesale severity and injustice to reach the statute under which the appellant claims, can not be the true one. It is simply monstrous; it is a disrespect to Congress to enter upon such a theory.

If such a diabolical policy shall ever be initiated by statute, a court will require it to be expressed in language too plain to be misunderstood. No court will find or search for such an inten-

tion by any dubious and speculative process of reasoning.

Endlich on St., Sec. 258.

It is true that the law of succession is based on kinship with the intestate; but it is not doubted that the legislature may dispose of intestate estates according to its wisdom; it may exclude all or any of the lineal kindred.

Accepting kindred as a basis, it may extend the provision to any relationship, whether legitimate or otherwise, and it would be important only in the interpretation of the legislative will; there is no limitation of its power depending on it.

Every legislature may judge of the tendency of its measures, and define their scope. Antagonism of one to another can only be judicially recognized for repealing effect when it involves a positive contradiction. As already shown, there is no such contradiction.

This conclusion, obvious and satisfactory as it must be from the foregoing considerations, is confirmed and placed beyond all reasonable doubt by another, which is absolutely conclusive, namely:

V. All the acts of Congress on the subject of polygamy and the legal status of polygamous children are to be construed together, and they show affirmatively that it was and always has been the intention of Congress that all polygamous children should inherit under the territorial laws, except, since 1887, those excluded by the Edmunds-Tucker bill.

This is the plain and obvious conclusion, which cannot be resisted, of a construction of the Statutes *in pari materia.*

Statutes which relate to the same subject—to the same persons or things—are *in pari materia.* They are to be construed so that each of them may explain, interpret, and enforce the others; and although they may have been passed at different times; although some of them may have expired or have been repealed; although there may be no actual reference in one of them to the others, or

any clause directing the several acts to be read as one, they must be regarded as forming one harmonious system, as so many parts of the same statute.

Wilb. on St., Sec. 262.
United Society *vs.* Eagle Bank, 7 Conn., 469.
Endlich on St., Secs. 43, 47, and cases cited.

In United States *vs.* Freeman, 3 How. 556, this court says:

"The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia*, are to be taken together as if they were one law. * * * And if it can be gathered from a subsequent statute, *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, *and all will govern the construction of the former statute.*"

The anti-polygamy law of 1862, the Edmunds law of 1882, and the Edmunds-Tucker law of 1887, are *in pari materia*, or rather they constitute strictly one act, as the later acts are professedly amendatory of the first. They are therefore to be construed as one law, as making one harmonious statute. One part may be considered to explain and enforce another part; a later-passed provision which is plain will govern the interpretation of an earlier-passed provision which is less certain.

The act of 1862 is entirely silent as to the children of polygamous marriages. Whatever effect it has upon them results consequentially from such marriages being rendered invalid and unlawful. Necessarily the children thereafter born are illegitimate; that is, they are not born of mothers in lawful wedlock.

This is a secondary effect of the act. The silence of this act implies that the attention of Congress was not called to them. It is consistent with this implication that the Legislature of the Territory was at liberty to legislate according to its discretion in their behalf, that it might require a putative father to support them, or to give them a right to inherit from him. Such legislation does

not conflict with the act which Congress had passed; that is, marrying a plurality of wives was nevertheless a crime; all acts establishing, maintaining or countenancing polygamy were nevertheless abrogated; the children might even be legitimated without modifying the effect of that act in its definition of polygamy, in prescribing the penalty, and in removing all legal props or supports to that proscribed institution.

There was a general law of the Territory in force in 1862 that illegitimate children might inherit. This act had been reported to Congress; it was before that body when this act was passed. Congress did not annul it or refer to it.

In 1882 the Edmunds bill was passed. It re-enated the first section of the law of 1862; multiplied the penalties and added disabilities to polygamists, knowing that the territorial law, just referred to, had been constantly enforced, had been re-enacted in 1876 in a modified form, but still giving polygamous children heritable blood, a right to inherit from the father if he acknowledged them, that under that statute they continued to inherit as illegitimate children. This act was before Congress when the Edmunds act was passed; the latter did not annul it; there are no general words of repeal in it like those in the second Section of the act of 1862, though Congress must have known that the Courts administering the law of descents in the Territory had not regarded the act of 1852 as annulled; although it was reminded that the territorial legislature had recently legislated again in favor of inheritance by illegitimate children. Congress, however, does not remain silent on the subject. In the Edmunds law it then legislated in the same line, inserted a provision in the Edmunds bill still more comprehensive than these territorial laws, in the same spirit, extending the relief further to polygamous children. *it legitimated them all*, and it extended this humane provision to a future date, to include all that would be born within a subsequent period of gestation.

The appellant was thereby legitimated. His father had died twenty-three years before, and the title to his estate had descended to him in common with the other son, who was legitimate.

The polygamous son took as illegitimate. The Edmunds act made him legitimate. The two acts construed together must be construed as harmonious, as parts of one act. They are such. The kindly spirit which induced the complete legitimation of polygamous children, by the second or first amendatory act, existed, though not expressed, in the first.

If, by reading the first and third sections of the act of 1882 and all the sections of the act of 1862, there is an inference from supposed silence that polygamous children share the legislative condemnation of polygamy, that inference is proved to be a mistaken one by reading the seventh section of the later act. Since one part will explain and interpret another part of a law, or system of laws, and a later provision an earlier, and they are deemed parts of one harmonious whole, the seventh section of the act of 1882 declares that the act of 1852 was not intended to be in anywise inimical to polygamous children; that it was intended to harmonize with any legislation to remove in part or wholly the disabilities of illegitimacy, because that section did legitimate them.

The conclusion is absolutely irrefragable. The rule for construction of statutes *in pari materia* leads directly to it. The intention of the legislature in passing the act of 1862, is the same intention more fully expressed in the act of 1882. They are deemed to be in perfect accord. What Congress said in 1862 it repeated in 1882; what it said for the first time in 1882, was its unspoken intention in 1862. The Territorial Legislature, in providing for inheritance by illegitimate children, legislated in harmony with that unspoken intention. In so legislating it did nothing to countenance polygamy; nor did Congress in extending their rights. The act of 1882 increases the punishments for polygamists, and in the same breath say these stripes are not for the children. By the rule of construction which we invoke this provision is in harmony not only with the other provisions of the act of 1882, but with all the provisions of the act of 1862. If so, the Utah act of 1852 did not countenance polygamy.

This argument does not need for its confirmation that the act

of 1887 should be cited, but as it puts that conclusion in words, and is part of the system of statutes on this subject, and expresses the intention of all, we quote it to crown our effort. It is a legislative sanction.

In that act Congress says our argument is sound. To gainsay our argument is to refuse to recognize that Congress has given a true exposition of its own intention.

Sec. 11 of the Edmunds-Tucker Act is, "that the laws enacted by the Legislative Assembly of the Territory of Utah which provide for and recognize the capacity of illegitimate children to inherit, or to be entitled to any distributive share in the estate of the father of any such illegitimate child, are hereby disproved and annulled, and no illegitimate child shall hereafter be entitled to inherit from his or her father.

"*Provided*, That *this section shall not appty to any illegitimate child born within twelev months after the passage of this act, nor to any child made legitimate by the 7th section of the*" Edmunds Law.

The annulling of the laws of the territory here mentioned evinces no dissatisfaction with their operation in the past, nor any denial that they have operated in the past. The language of this section implies that those territorial laws have operated, and that they will operate, except as that section otherwise provides.

It is plain enough that it is assumed by Congress that all the persons whom this proviso saves from the effect of the purview of the section will inherit under the territorial laws. The laws which Congress thus assumes to be in force, the respondents contend are repealed by the very law which contains this assumption, for all this series of acts being *in pari materia*, we denominate one law; such is the legal rule of interpretation, and it is expressly asserted in U. S. *vs.* Freeman, *supra*. This section of the Edmunds-Tucker act impliedly provides that all persons legitimated by the Edmunds law, and all who should be born within twelve months after the passage of the act should inherit from their fathers. It so provides by assuming that such inheritance will be realized under the territorial statutes.

Strictly, a repeal of the territorial laws there described could only take practical effect on the act of 1884. After a descent cast, the title then vesting under the law in force, no subsequent statute, even of Congress, could disturb or divest it. But to prevent any question as to the future, when the disqualification was intended to attach, the repeal is of "*laws*," evidently to embrace those of all dates and a plurality, and the saving is equally comprehensive.

There have been three territorial acts providing for inheritance by illegitimate children; they were enacted, respectively, in 1852, 1876 and 1884. Each of the later acts, in its turn, took the place of the preceding act. The validity of neither, except as effected by the Edmunds-Tucker act, can be questioned. As Congress affirmed, in 1887, the operation of these laws, the Court should follow the same construction.

These acts are similar, and in their secondary effect as to polygamy, are not distinguishable. If either could operate in harmony with the congressional legislation against polygamy, the others could. If either countenanced polygamy, all did. If the first was annulled by implication because it came, by its effects, within the category of acts which established, maintained, supported or countenanced polygamy, the later acts would come under the same condemnation.

Adopting, as true, the argument we have made, that territorial statutes to come within the effect of that annulling provision, must purport to sanction polygamy, all these territorial acts relative to inheritance by illegitimates, are identical in character; they must all be held valid, or all be held void by that test.

While the general government, by its successive acts, was increasing the severity of its chastisements of polygamists, it is not supposable that it intended to be more tolerant in respect to local legislation having the effect to countenance the institution which it was aiming to destroy.

If the act of 1852 was annulled because it countenanced polygamy, the act of 1876 was a repetition of the attempt by the territory to countenance it, and the congressional act of 1882 should have

annulled it with the emphasis of a righteous indignation. But such was not the temper or conclusion of Congress. If those territorial acts of 1852 and 1876 countenanced polygamy, Congress itself countenanced it, and countenanced it emphatically; for it legitimated all the illegitimates to whom the acts of 1852 and 1876 gave the right to inherit, thus confirming not only that right, but otherwise wholly taking away their reproach.

The last act of Congress was enacted as a last resort, after the contumacy of polygamists had exhausted the patience of Government; when forbearance had reached its limit.

In 1882, Congress said that the President might even forgive the offenders themselves if they would sin no more. But they had not accepted the clemency, and the conclusion was like that of the farmer of the fable in juvenile literature, which so tenaciously clings to everybody's memory. "if neither words nor grass will do, I must try what virtue there is in stones."

In this act, Congress signifies an intention, in the future, to put a part, but a specific part, of the punishment upon the offspring. This application of the governmental severity shocks one's sense of justice; it suggests painful reflections which we will not pursue.

This feature of the act does not, however, evince a purpose to wholly blight the lives of the children; it puts them under a definite and precise disability. It may have been intended never to operate. The tender of clemency was not withdrawn; a *locus penitentia* was given, and this threat of cruelty to the offspring was perhaps expected to be persuasive in the meantime.

It is a prospective departure in the policy of the government, and it serves as a foil to the benign countenance turned upon the class to which the appellant belongs.

This feature of the Territorial statutes has existed nearly forty years. It was enacted originally in 1852, re-enacted substantially in 1876 and 1884. It has thus become a rule of property, and to overturn it at this late day would unsettle many estates. It would be attended with all the evils against which the permanence of rule of property is intended to be a protection.

J. G. SUTHERLAND,

Attorney for Appellants.

Office Supreme Court U. S.
FILED.
DEC 3 1890
JAMES H. McKENNEY,

In the Supreme Court of the United States.

October Term, 1890.

No. 1327.

George H. Cope,
Appellant,
vs.
Thomas H. Cope and Janet Cope,
Respondents.

BRIEF FOR RESPONDENTS.

In the Supreme Court of the United States.

ESTATE OF THOMAS COPE, DECEASED.

GEORGE H. COPE,
Appellant,
vs.
THOMAS H. COPE and JANET COPE,
Respondents.

BRIEF FOR RESPONDENTS.

This cause arises from the following facts: Thomas Cope died at Salt Lake City, August 22d, 1864, leaving surviving him, Janet Cope, his legal wife, Thomas H. Cope, a son by his lawful wife, and George H. Cope, a son by his plural wife, Margaret Cope, and the sole question is, whether George H. Cope in 1864 was an heir of the deceased Thomas Cope.

He claims under the Territorial law of 1852, which reads as follows:

I.

"Illegitimate children *and their mothers* inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the Court that he was the father of such illegitimate child or children."

Compiled Laws of Utah, 1876, Sec. 677.

This enactment is made for the purpose of changing the common law, according to which an illegitimate child is *filius nullius*, without kindred, and can take nothing by inheritance from either father, mother, brother or sister, and has no inheritable blood. If now we come to investigate this Territorial statute without reference to the unprecedented condition of affairs existing in Utah Territory, we notice some very peculiar facts. The section above quoted follows the section providing for the inheriting of property by the lawful wife and lawful children. And if a court were construing this statute with reference to any ordinary condition of society, it would probably hold that the inheriting of property by illegitimate children and their mothers was postponed to the inheritance of the lawful wife and legitimate children, and that illegitimates and concubines would inherit only in default of a lawful wife and legitimate children. This statute being in derogation of the common law, such would probably be the construction put upon it.

Again, this statute does not legitimate bastards, does not permit them to inherit from the mother, and does not give them heritable blood, by permitting them either to transmit or receive property in any way, except from the father. The statute showing on its face no design to assist a bastard in any way, would probably be taken by a court as permiting their inheriting simply to avoid an escheat, were it enacted by a legislature holding the civilized idea as to the marriage relation.

But, however that may be, in no circumstances would such a statute ever be construed to permit an adulterine bastard to inherit from the father. I venture to assert that no system of civilized jurisprudence ever permitted such a thing. I am aware that the Supreme Court of the United States held in the case of *Brouwer's Lessee* vs. *Blougher* (14 Pet., 178), that a statute of Maryland giving all illegitimates inheritable blood, applied to bastards that were the fruit of an incestuous connection. But the whole history of this question shows that adulterous bastards are never permitted to inherit from the father. By the common law a bastard had no rights of inheritance, and the robust conscience of the English people always resisted any change, even in the case of *bastards eigne*. By the civil law, as it originally stood, a bastard, *provided his parents afterward married, and at the time he was begotten were capable of contracting marriage*, was legitimated and inherited. But later, in the time of Justinian, a Novel was announced that permitted a bastard to be legitimated and to inherit, *if he were adopted by the father, or legitimated by a last will and testament, provided, however, that the parents were*

capable of contracting marriage at the time he was begotten. It is a curious historical fact that this Novel of Justinian can be traced to a priesthood that was in difficulties, just as the Mormon priesthood. The enforced celibacy of the clergy had been a practice in the church for, perhaps, a century, and the priests were desirous of providing for their illegitimate children. A marriage with the mother, while not illegal, was not permitted by the church, and, therefore, this new means of legitimating children. But bastards that were the fruit of an adultery were always excluded from an inheritance.

Gaines vs. *Hennen*, 24 How., 553.

In the United States, relaxations of the common law have been made in favor of bastards. Inheritance from the mother is generally permitted, and from the father by after marriage of the parents, or where there are no lawful children, or where an adoption is made in due form, or when recognition is made by will. But it is asserted by the editors of Rapalge and Lawrence's Law Dictionary that these statutes do not permit an adulterine bastard to inherit.

Rapalge & L.'s Law Dictionary, title "Bastard."

And it has lately been held by the Supreme Court of Kentucky that such is the law. The Court, speaking by Chief Justice Pryor, in an opinion which is not only consistent with the whole history of civilized jurisprudence, but which shows the feelings of a high-minded gentleman, decides that an act which permits the bas-

tard whose parents after his birth intermarry, to inherit, was not intended to apply to the case of an adulterine bastard. The ground upon which the reasoning of the court proceeds is that to permit it would be a heinous wrong, subversive of society and all good morals.

Sams vs. *Sams Adm'r*, 85 Ky., 396.

So that I assert that were we construing the law, the appellant, George H. Cope, could not inherit, unless we should take into consideration the intention of the Utah Legislature when it enacted this peculiar statute.

II.

This law was passed in the year 1852 in a community living in one of the remote Territories of the United States. These people professed to believe, and doubtless did believe that the practice of polygamy was enjoined upon them by a revelation from the Almighty. They had withdrawn into a western valley in order to practice this belief. They had founded a government, and were making laws for their community. Each man believed that it was his religious duty, obeying a Divine Command, to enter into a state of open and confessed adultery. They discarded all "man-made laws" that infringed upon that peculiar institution. The whole governmental machinery of the Territory was in the hands of polygamists; the practice of polygamy was prerequisite to all ecclesiastical, political or social preferment or success. The legislators were all polygamists,

the fathers of bastard children. With the fanaticism of a raw and crude belief, they set to work to render themselves secure in the faith and their practice. They recognized no disgrace as attendant upon bastardy; they confessed no stain upon their adulterine children. All children, if only born under the cloak of a spurious and plural marriage, were equal to lawful children. The only bastards whom they recognized and protected were the adulterine bastards, and in their eyes all wives, lawful and unlawful, and all children, legitimate or illegitimate, were on the same plane, and entitled to the same rights.

One of the first acts passed by this legislature was an act which permitted illegitimate children *and their mothers* to inherit in like manner as the lawful wife and children. It is plain that this enactment was intended to put the plural wife and her children on an exact level with the lawful wife and her children. Was such an act ever valid? Can such legislation by a territorial legislature be deemed within the grant of power? Is it not void on principles of public policy, as opposed to all decency and morality, and manifestly intended to legalize a system of concubinage and polygamy? Never before in any civilized country had such legislation been attempted. It surely could not be contended that the Utah legislature could enact a law declaring that a man might have two lawful wives, and make a lawful marriage with one woman while a marriage with another was still existing. It can not with any better grace be said that the legislature could enact a law which, with respect to property rights and inheriting from the hus-

band, places lawful wife and concubine on exactly the same plane, makes them wholly equal, encourages and protects the evil practices of adultery by offering a reward to the woman who sacrifices her virtue to the calls of an alleged religion.

III.

But granting, for the sake of the argument, that the law of 1852 was valid, was it annulled by the law of 1862, passed by Congress? And in considering this question I draw attention to the point that there is a wide distinction between "annulling" and "repealing." A repeal is made by the same body that enacted the law, and hence we have all the doctrine of implied repeals, because it is considered that the same body that enacts a law would not repeal it without saying so, either expressly or by necessary implication. On the other hand, the power that annuls a law is above the power that enacts it. It is a different body, not familiar, perhaps, with the legislation of the inferior. The strict doctrine of repeal can not, with any accuracy of juridical expression, be applied to "annulment." And in disapproving Territorial laws, Congress, when a large number of them are submitted, may well annul them by a general phrase, covering many provisions of the Territorial laws.

I invite attention to the anti-polygamy law of 1862 (12 Stat., 501). Section 1 of that act defined and punished the crime of bigamy. Section 3 limited the amount of property a church might hold in the territo-

ries. Section 2 disapproved by name the law incorporating the Mormon Church, and then proceeded: "And all other acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah which establish, support, maintain, shield, or countenance polygamy, be and the same hereby are disapproved and annulled," and this phrase is repeated in the proviso, as "all acts and laws which establish, maintain, protect or countenance the practice of polygamy." We may safely assume that Congress meant something by this language, "all other acts and parts of acts," etc. And the sole question to determine is, did the Territorial law of 1852 establish, support, maintain, shield or countenance the practice of polygamy? What else did it do but just that thing? The matter seems too plain for serious contention. Did it put lawful wife and concubine on a level, did it offer the plural wife a reward, did it protect her children and give them an inheritance, did it abolish, so far as it could, the rights of the lawful wife and her children, did it practically destroy the property safeguards thrown around wife and children? If it did so, then it supported, maintained, shielded and countenanced the practice of polygamy.

The suggestion is made, however, that this act annulled no law unless it applied to polygamy and assumed it to be lawful or professed to make it so. This idea is not warranted by the words of the act, to "support," "countenance," "shield" or "protect." The act itself shows that Congress understood the word differently, because the charter of the church is expressly disapproved, although it in no manner legalized or pro-

fessed to make lawful, polygamy, and then proceeded to disapprove all other acts and parts of acts that countenanced, supported or protected polygamy. It is worthy of remark that a careful perusal of the Utah statutes of 1862 discloses no other law than this for the clause of general disapproval to act upon. All parts of an act should be given effect, and it is treating a solemn enactment in too frivolous a spirit to say that Congress meant nothing by its language, but simply used a phrase of seeming import in order to round out a period. I apprehend that words used in their ordinary sense in a statute are to be given their ordinary meaning. A law that supports polygamy and its practices need not legalize it; a law that countenances or shields it need not make it lawful. Any plain man of common sense in reading this statute would unhesitatingly say that it was a covert attempt to encourage, aid and support the practice of polygamy, and that it was enacted solely for that purpose and with that end in view.

IV.

But the matter becomes even plainer when we apply those well-known rules of statutory construction that are put in the terse language of Lord Coke: (1) What was the law before the act was passed; (2) What was the mischief to be remedied?

Haydon's Case, 3 Rep., 76.

We arrive at the meaning of the law by taking into account its purposes and aims, and a more signal in-

stance of this can not be cited than the construction put upon a penal statute by this Court.

United States vs. *Cannon*, 116 U. S., 55.

The meaning of a statute we seek for in the statute itself. The language shows its meaning, and the law itself is the best exposition of that meaning, and it is the duty of the courts to give effect to the plainly expressed meaning.

Thornley vs. *United States*, 113 U. S., 310.
Poor vs. *Considine*, 6 Wall., 458.
Pennington vs. *Coxe*, 2 Cranch, 33.

This act before us says that it means to disapprove every act that countenances, shields or supports the practice of polygamy; it expresses its meaning and intention for itself in ordinary language.

The law before this act was passed was simply this: A concubine and her children by a community that was trying to destroy the monogamic household, were given all the rights of inheritance of the lawful wife and her children.

But, in a wider sense, what was the evil to be remedied? This law, in common with another, was part of a system for legalizing and supporting the practice of polygamy. This practice and this community have often been the subject of comment by this Court. Mr. Justice Field has said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian coun-

tries. . . . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment." (*Davis* vs. *Beeson*, 133 U. S., 333.) Mr. Chief Justice Waite has said: "In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government, to a greater or less extent, rests." (*Reynolds* vs. *United States*, 98 U. S., 145.) Of the object of this class of legislation, Mr. Justice Matthews has forcibly said: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. (*Murphy* vs. *Ramsey*, 114 U. S., 15.)

This religious community had enjoined upon their members the practice of polygamy. Many of them were polygamists, and they were seeking to intrench themselves in a mountain valley far in a western territory. The history of the sect shows the result. Mr. Justice Bradley, in describing the result, has said: "It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to

their attempt to establish an independent community, to their attempt to drive from the territory all who were not connected with them in communion and sympathy." And again: "Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts make to suppress this barbarous practice—the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. . . . The existence of such a propaganda is a blot on our civilization." (*Mormon Church* vs. *United States*, 136 U. S., 1, 48.)

At this time, in 1862, the Mormon community had been settled in Utah for fourteen years. One of the first acts of their legislative assembly had been to provide for the plural wives and their illegitimate offspring. The community was governed by polygamists, the laws were made by them. A large proportion of the population was at that time made up of polygamous wives and their children, and the evil was constantly increasing. This system they were striving to buttress up by laws of their own making. They had done the most natural thing for them to do, by making all wives and all children equal so far as rights of inheritence were concerned, and were striving to do more. In such a state of society a law that permits illegitimate children to inherit directly encouraged and supported the practice of polygamy. With insidious wickedness it said to the plural wife: "We protect you and your children; we make you the equal of the first wife; and we make your children the equals of hers; we share the husband's property between you." In ordinary communities the

public conscience frowns upon concubinage and bastardy, and the disgrace attendant upon illicit connections is so great that, under certain circumstances, bastard children may inherit. But here all barriers were thrown down, and in a community devoted to polygamous practices all illegitimates, whether acknowledged or not, were permitted to inherit from the father, and the guilty partner of the crime was granted a reward for her criminality.

Such was the state of the law and of this community when the law was passed; the evil was plain; the remedy applied was to annul this very act. Congress certainly intended to do so. It put that intention into words and said, this law shields and countenances polygamy; worse than that, it assumes it to be lawful and provides for the fruits of polygamy. But it is urged that this law is odious and atrocious. It is, perhaps, enough to say that it is only where a peculiar cast of thought is engendered by constant association with polygamy and a debauchery of proper feelings of morality is produced, that a law which has for its only aim the repression of polygamy, and the prevention of vice and crime, and strives for such beneficial results as Mr. Justice Matthews indicates, could be characterized as odious and atrocious. Laws enacted for the supression of a public wrong, or to effect a public good, are not in any sense penal acts. Revenue laws may inflict a penalty, but they should be construed so as most effectually to accomplish the intention of the legislature. This law was aimed to remedy a great public evil, an outrageous wrong, and it should be so construed. It simply re-

stores the common law, which may be unwise in the protection it gives to the monogamous marriage, but we have not commonly so regarded it. But it is a singular misconception to say that the law of 1852 had given polygamous children inheritable blood, and its annulment would leave them without father or mother, brothers, sisters or collateral kindred. The law of 1852 left them in exactly that condition; one bastard could not inherit from his brother, his sister, his mother or his collateral kindred, nor could he transmit his own property to any but his own children. This very fact is one of the ear marks that show the purpose, the intent and the reason of the law of 1852—simply to let the father's polygamous children and his plural wives share in his property.

But it is said that if this law is annulled, all other laws which protect polygamous children in common with the rest of the community are annulled—that the law permits a bastard to vote and hold office, and makes it murder to kill him, or larceny to steal from him, and, therefore, these laws encourage polygamy. But the law makes it murder to slay the horse thief, but no one ever seriously urged that the law thereby encouraged grand larceny. So the law makes it murder to kill the murderer in the peace of the people, but it is not believed that the law thus encourages murder, while striving to repress it. The difference is that public peace and good order are of more value than a mere imaginary result. But the Territorial law of 1852 avowedly and necessarily encouraged the practice of polygamy, not incidentally, but immediately and completely.

V.

The acts of Congress of 1862, of 1882, and of 1887, are said to be *in pari materia*, and, therefore, are to be construed together. The rule is commonly considered to be that a later act is construed with reference to former acts *in pari materia*. If the former act has had a judicial construction, this is considered to be incorporated in the later act. If words are used in the former act in a certain sense, the same words are considered to be used in the same sense in the later act. Such are instances of the doctrine. It would afford some method of inference as to the meaning of the law of 1882 or 1887, but would not afford much knowledge of the law of 1862. Otherwise the rule assumes that law-makers are gifted with prophetic instinct of what a later Congress will assume that they meant. But, still, it is urged that the law of 1882 shows a legislative construction of the intention of Congress in passing the law of 1862. Merely suggesting that the intention of Congress is to be drawn primarily from the act of 1862 itself, and that this intention is there plainly and clearly expressed, let us see what the result is. The Territorial legislature, at any rate, supposed that the law of 1852 had been annulled in 1862, for they enacted in 1876 that illegitimate children should inherit from the father when acknowledged by him.

Utah Compiled Laws, 1876, Sec. 714.

But this act did not, in express terms, repeal the law of 1852, and, according to the contention of appellant as

to implied repeals, and the authorities cited in appellant's brief, this law would stand with the law of 1852, only, however, requiring the children to be acknowledged. So, now it would read, illegitimate children and their mothers inherit from the father when acknowledged by him. Now comes the Edmunds law of 1882.

22 Stat., 31.

This law, while providing further punishment for polygamy and its accompanying evil, in the seventh section of the act legitimates the issue of polygamous Mormon marriages born prior to January 1st, 1883. Now, then, what was the reason for legitimating the Mormon illegitimates and none other? What valuable right did they acquire by legitimation except that of inheritance? But, according to appellant's contention, they would already inherit under the Territorial law, and this Congress understood. Why, then, legitimate them, unless Congress may be suspected of taking a journey into the domain of sentiment in order to give standing to the Mormon polygamous children by a statutory legitimacy?

Thus the law remained until 1884, when the Territorial legislature enacted another law upon this subject, which is precisely the same as the other law of 1876, except that the issue of all marriages null in law are legitimated.

Compiled Laws of Utah, 1888, vol. 2, sec. 2743–3.

The three laws are as follows:

1852.

Illegitimate children *and their mothers* inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children.

1876.

Every illegitimate child is in all cases an heir to its mother. It is also heir to its father when acknowledged by him.

If an illegitimate child die intestate, without leaving issue, or husband or wife, its estate goes to its mother, or, in case of her decease, to her heirs-at-law.

1884.

Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. *The issue of all marriages null in law or dissolved by divorce are legitimate.* If an illegitimate child dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs-at-law.

This last statute had introduced a new element by making the issue of all marriages null in law, legitimate. This legitimated the issue of all Mormon marriages that were not already legitimated by the Edmunds law of 1882, although it could not affect a descent cast between January 1st, 1883, and 1884. But under this law, if valid, all Mormon polygamous children inherited, not only from the father, but were made legitimate for all purposes. The next statute after this is the Edmunds-Tucker law of March 3d, 1887, 24 Stat., 635. Section 11 of that act provides:

"That all the laws enacted by the legislative assem-

bly of the Territory of Utah, which provide for or recognize the capacity of illegitimate children to inherit, or to be entitled to any distributive share in the estate of the father of any such illegitimate child are hereby disapproved and annulled, and no illegitimate child shall hereafter be entitled to inherit from his or her father, or to receive any distributive share in the estate of his or her father," with a saving as to the children legitimated by the Edmunds law, and as to all others born within twelve months after the passage of this act.

This statute recognizes that the permission to inherit was one of the means of countenancing and supporting the practice of polygamy, and is a most emphatic legislative declaration of that fact.

But it is claimed that this act is a legislative recognition of the fact that the law of 1852 was still valid. Of course this argument loses all point if there was any other enactment of the Territorial legislature for this clause to act upon. Now, the statute of 1884, making the issue of all marriages null in law, legitimate, was a provision to enable illegitimate children to inherit, and the other provisions of the act of 1884, as well as the act of 1876, which might be considered valid and ought to be disapproved.

But more than this, the Territorial law of 1852, nowhere in the statutes of Utah Territory can be found to be repealed. Under that law, construed with other statutes, illegitimate children and their mothers inherited. But it surely can not be supposed that Congress would annul a law allowing the illegitimate children to

inherit, and still permit the guilty mother of such offspring to share in the estate. But if the law of 1852 is not annulled by the anti-polygamy law of 1862, these mothers still share in the estate, and do unto this day, and Congress has rewarded the mother, while visiting condemnation on the children.

So, in whatever way we look at this question we are led to the same result. Congress has twice, in 1882 and in 1887, extended its aid to the illegitimate children. "The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons." (Mr. Justice Bradley, *supra.*) While it may be true that the polygamous children who did not inherit whenever a descent was cast from the year 1862 to the year 1882, are in an unfortunate situation, yet the law aims at general good. It is hard for the destitute wife and children of a criminal that he should be imprisoned, but their suffering is lost in the general welfare. The polygamous children who will suffer by this construction are now happily but few, for estates that came into the Probate Court prior to 1882 are by this time long settled.

R. N. BASKIN,

~~HOLLY M. YANE,~~

Attorney for Respondents.

137-189

Supreme Court U. S.
FILED.
NOV 14 1890
JAMES H. McKENNEY,
CLERK

In the

Supreme Court of the United States.

No. 1380, of October Term, 1890.

The Massachusetts Benefit Association

vs.

Sarah G. Miles.

Sur Motion to dismiss Plaintiff's Writ-of-Error for want of Jurisdiction.

Plaintiff-in-Error's Paper Book.

Ernest L. Tustin,
Wm. F. Johnson,
Frederick Carroll Brewster,
Against the Motion.

Argument

Of Plaintiff-in-Error (*sur* Motion to Dismiss the Writ-of-Error) in support of the Writ.

In the

Supreme Court of the United States

October Term, 1890. No. 1380.

The Massachusetts Benefit Association,

Plaintff-in-Error

vs.

Sarah G. Miles,

Defendant-in-Error.

The recital of the Pennsylvania Statute of 1700 by the defendant-in-error, which allows interest on *judgments* from the time of such *judgment*, falls just short of a proper elucidation of the point involved in the motion under consideration.

There was other legislation on the subject.

From the passage of the Act of Assembly of 1700 down to the Act of 6th April, 1859, § 1 (*P. L.* 381) (*Purdon's Digest, sub tit. Verdict p.* 1697 *pl.* 3) no verdict bore interest; nor was it a *lien* upon real estate until the passage of the Act of 23d March, 1877, § 1 (*P. L.* 34). (*Purdon*, 1697 *pl.* 4); and the second section of the last Act fixed the *lien* of the verdict from its rendition in all cases where a motion for a new trial was overruled.

The Act of Assembly of 29th March, 1805, § 13 (*Purdon p.* 1697 *pl.* 2) provided for the payment of a jury fee of four dollars.

The practice in Pennsylvania upon this branch of the law, therefore, stood, historically, thus: Prior to 1805, the prevailing party could seal judgment upon his verdict on the *quarto die post*, or on the discharge of the motion for a new trial or in arrest of judgment, without payment of costs. From that date to the present time he must pay his jury fee at or before sealing judgment. The difference between the *verdict, judgment* and *lien* has always been kept conspicuous. The *verdicts* bore no interest until 1859, nor were they *liens* until 1877. The judgment was the criterion of the successful party's right to interest, and only from the date of its entry, prior to 1859; subsequent thereto, by virtue of the recited statute, it was immaterial when the *judgment* was entered, the interest was due from the date of the *verdict*. There is no such practice in Pennsylvania as reassessing damages. The prevailing party pays his jury fee to the Prothonotary, who enters upon the Docket "—18—Jury fee paid. *Eo die*, Judgment"; and upon the going out of the execution, *the date of the rendition of*

the verdict is inserted therein, as the date from which interest shall be collected; and from the United States Circuit Court it is endorsed on the writ. (See Exhibit.)

The Act of 1859, referred to, is as follows:

"It shall be lawful for any party or parties, in whose favor any verdict may be rendered for a specific sum of money, to collect and receive interest upon such sum, from the date of the verdict; and every general judgment entered upon such verdict, whether by a Court of original jurisdiction, or by the Supreme Court, shall be deemed and held to be a judgment for the sum found by the verdict, with interest thereon from the date of such finding."

The Act of 1877, referred to, is as follows:

"Whenever a verdict is rendered by a jury, in any of the Courts of Common Pleas of this Commonwealth, for any specific sum of money, in each case the verdict shall be a lien upon the real estate, situate within the proper county, of the party or parties against whom said verdict shall be rendered, etc."

Wherefore in the case under consideration the defendant (below) could not have discharged the judgment on the day of its rendition for $5,000. It was a judgment on a verdict rendered on the 18th October, 1889, and the plaintiff was on the day of judgment entitled to receive $5,010.83, and such was the amount of the judgment in fact and in law.

In *Walker* vs. *U. S.* (4 *Wallace* 163), the Court says: "Interest on the judgment can only arise *after rendition*, while the jurisdictional amount, if determined by the judgment, is fixed at rendition;" and therefore properly dismissed the writ. In the present case the judgment was on a verdict and in a jurisdiction where the interest did arise *BEFORE rendition* of judgment, and was included therein.

And following this same line the Court sustained the writ in *Patapsco* vs. *Borland*, 79 *U. S.*, 52, saying: "On looking

at the record we find that the decree of the Circuit Court was for the amount reported due the libellants on the 15th July, 1868, $1,982.07, and interest from the date of the report. We think tnat interest from the date of the decree must be computed as a part of the sum for which the decree was entered."

This is all the Court is asked to do in the present case—the cases are identical.

In the case of *New York Elevated Railroad* vs. *Fifth National Bank*, (*118 N. S., 608*), cited in support of the motion to dismiss and endeavored to be distinguished from the present case, we can find no substantial distinction. There the verdict was on 9th June, 1886, $5,000, a motion for a new trial, the denial of the motion on the 10th August, and judgment on 25th of same month for $5,068 33—that being the amount of the verdict and interest to the date of judgment. Here was a verdict for $5,000 on October 18, 1889, a motion for a new trial, the denial of the motion on the 31st day October, 1889, and judgment on same day—for what? *The amount of the verdict and interest from the date of its rendition, sec. leg.* Had the practice been the same in New York as in Pennsylvania, the judgment would have been upon the verdict, in the cited case, but, nonetheless, for $5,068.33—the amount due the plaintiff that day; nor was the judgment in the present case, on the day of its rendition, any less than $5,010.83.

We append as an exhibit the endorsements of a writ of *fieri facias* as it would have issued on the day of the entry of judgment in the case, furnished by the Clerk of the Court, showing that interest would have been collectable from the

date of the verdict, in strict accord with the uniform practice and the law of the State of Pennsylvania.

Wherefore, it is submitted that the judgment in this case is above the jurisdictional limit, and the motion of the defendant-in-error, to dismiss the writ of error, should be refused.

ERNEST L. TUSTIN,
WM. F. JOHNSON,
FREDERICK CARROLL BREWSTER,
For Plaintiff-in-Error.

"Exhibit."

No. 12

Circuit Court, April Session, 1889.

Sarah G. Miles

vs.

The Massachusetts Benefit Association.

FIERI FACIAS.

Returnable on the first Monday of next.

Real Debt	$5000.	
Interest from October 18th, 1889.		
Costs.——Attorney and Writ		22.40
Clerk		16.30
Crier		.50
Fi. Fa.		2.40

Office Supreme Court U. S.
FILED.
OCT 23 1890
JAMES H. McKENNEY
CLERK.

Copy of Motion to Dismiss the Writ of Error.

IN THE

Supreme Court of the United States.

Of October Term, 1890. No. 1380.

THE MASSACHUSETTS BENEFIT ASSOCIATION

vs.

SARAH G. MILES.

Now comes the defendant and moves the Court to dismiss plaintiff's writ of error herein for want of jurisdiction for the following reason:—

The amount of the judgment in favor of the plaintiff in the Court below (defendant in error), does not exceed the sum of five thousand dollars.

Sarah G. Miles brought suit against the Massachusetts Benefit Association to recover five thousand dollars, the amount of a policy of which she was the beneficiary. There was no counter-claim on the part of the association. The jury rendered a verdict upon October 18, 1889, for five thousand dollars. A motion for a new trial was made by the defendant, and on October 31, 1889, this was denied, and judgment was ordered to be entered upon the verdict, which was accordingly done.

RICHARD P. WHITE,
Attorney for Defendant in Error.

Copy of Agreement filed of record to submit motion to dismiss Plaintiff's Writ of Error upon Statement of Case.

IN THE

United States Supreme Court.

THE MASSACHUSETTS BENEFIT ASSOCIATION,

Plaintiff in Error,

vs.

SARAH G. MILES,

Defendant in Error.

And now, to wit, October 17, 1890, it is agreed between counsel of record for plaintiff and defendant in error that the motion filed by defendant in error for the dismissal of plaintiff's writ of error be submitted to the Honorable Court upon the following statement of the case and copies of the docket entries and minutes of the said Circuit Court, for the Eastern District of Pennsylvania, no more than this being considered necessary to determine the question raised by the motion.

Statement of the Case.

Sarah G. Miles, the plaintiff below, brought an action of *assumpsit* in the Court of Common Pleas, of Philadelphia County, State of Pennsylvania, against the Massachusetts Benefit Association to recover five thousand

dollars, with interest, due to her as beneficiary in a policy of insurance upon the life of her husband, John S. Miles, by the defendant company. The said insured, John S. Miles, died on the sixteenth day of January, 1888.

The defendant filed pleas of "*Non assumpsit*, payment and payment with leave."

After the issue was made up the defendant removed the case to the United States Circuit Court, for the Eastern District of Pennsylvania, where it was duly called for trial on the sixteenth day of October, 1889. The defendant did not allege any counter-claim, but denied all liability upon the ground that the notices of assessment which it was required by the terms of the policy to send to the assured had been sent to him, and one assessment not having been paid by him, he was in default, and his policy consequently lapsed. Upon October 18, 1889, the said jury returned a verdict in favor of the plaintiff and assessed the damages at five thousand dollars.

A motion for a rule for a new trial was made by the defendant below, on October 22, which was argued on October 25, 1889. On October 31, 1889, the motion for a new trial was denied, and judgment was entered in open Court in manner and form as follows:

"Motion for new trial denied, and judgment ordered to be entered in favor of the plaintiff and against the defendant on the verdict. Whereupon judgment is entered accordingly."

Whereupon the defendant below took this writ of error.

Docket Entries and Minutes of the United States Circuit Court for the Eastern District of Pennsylvania.

April Session, 1889.

THEO. D. RAND.	SARAH G. MILES *vs.* THE MASSACHUSETTS BENEFIT ASSOCIATION.	Certified under Act of Congress, Summons Assumpsit.
No. 12		
JOHNSON & TUSTIN.		

March 18, 1889.	Exemplification of Record from the Court of Common Pleas, No. 3, for the County of Philadelphia filed.
Oct. 1, 1889.	Testimony of Witnesses on behalf of defendant taken before Simon W. Hathaway, Notary Public, Boston, Mass., filed. (14 ex.)
Oct. 16, 1889.	And now, to wit, a jury being called came, to wit, (see minutes).
Oct. 18, 1889.	And the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say that they find for the plaintiff, and assess the damages at five thousand dollars.
Oct. 22, 1889.	Rule with reasons for new trial filed.
Oct. 25, 1889.	Argued on rule for new trial.
Oct. 31, 1889.	Motion for new trial denied, and judgment ordered to be entered in favor of plaintiff and against the defendant on the verdict. Whereupon judgment is entered accordingly.

Nov. 25, 1889.	Præcipe for writ of error filed. Writ of error issued and copy thereof lodged in the Clerk's Office for the adverse party.
Nov. 25, 1889.	The Court fixes the security *sur* writ of error in the sum of eleven thousand dollars ($11,000).
Jan'y 14, 1890.	Bond approved and filed.

Minutes.

MILES
vs.
MASSACHUSETTS BENEFIT ASSOCIATION. } No. 12. April Session, 1889.

And now to wit, this thirty-first day of October, A. D. 1889, it is ordered that the motion for a new trial be and the same is hereby denied, and judgment ordered to be entered on the verdict in favor of the plaintiff and against the defendant. Whereupon judgment is entered accordingly.

RICHARD P. WHITE,
Atty. for Deft. in Error.

F. CARROLL BREWSTER,
Atty. pro Pltff. in Error.

Argument.

I. As the writ of error was sued out by the defendant below, and as no question is presented growing out of a set-off or counter-claim, the amount in controversy is fixed by the judgment.

Walker vs. *U. S.*, 4 Wallace, 163.

Thompson vs. *Butler*, 95 U. S., 694,

Hilton vs. *Dickinson*, 108 U. S., 175,

First National Bank vs. *Redick*, 110 U. S., 224.

Henderson vs. *Wadsworth*, 115 U. S., 276.

II. The verdict was for five thousand dollars, the judgment was entered generally on the verdict, so that this Court has before it only a judgment for that sum.

At common law judgments did not bear interest. Previous to the Act of 1842, interest could not have been levied upon process of execution upon the judgment of a Circuit or District Court of the United States—*Perkins* vs. *Fourniquet*, 14 How., Rep. 331. A *fortiori* verdicts do not bear interest unless it is so provided by the statute.

Interest is given by statute of Pennsylvania upon judgment from the time such judgment was obtained. Act 1700, 2 Purdon's Digest, Title Interest, page 928: "Lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for from the time the said judgment was obtained till the time of sale, or till satisfaction be made."

The Act of 1842, above cited, U. S. Rev. Stats., Sec. 966, p. 182, provides that "interest shall be allowed on all judgments in civil causes recovered in a circuit or district court, and may be levied by the marshall under process of execution issued thereon, in all cases where by the laws of the State in which such court is held interest may be levied under process of execution on judgments recov-

ered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law or judgment recovered in the courts of such State."

The case of *New York Elevated Railroad* vs. *Fifth National Bank*, 118 U. S., 608, is easily distinguished from the one in hand, In that case the verdict was for five thousand dollars and the judgment was subsequently entered for five thousand and sixty-eight dollars and $\frac{33}{100}$, which included interest from the date of the verdict to the date of the judgment. That judgment, upon its face, was for the jurisdictional amount, and this Court, following *Thompson* vs. *Butler*, 95 U. S., 694, and *Bank* vs. *Redick*, 110 U. S., 224, would not look beyond that, on a motion to dismiss, to see how the amount was obtained.

To determine the jurisdictional amount, however, neither interest on the judgment nor costs of suit can enter into the computation.

Western Union vs. *Rogers*, 93 U. S., 565.

In the case under consideration, no interest was claimed and the judgment stands for the amount of the verdict only.

No amount is mentioned on the record except five thousand dollars, and there was, therefore, no right to a writ of error.

If it should be said that plaintiff had a right to claim or could hereafter claim interest, it is replied that the right of appeal depends upon the record as it stands when the right is claimed—not on what it might have been.

JAS. AYLWARD DEVELIN,
THEO. D. RAND,
RICHARD P. WHITE,
Pro Defendant in Error.

In the
Supreme Court of the
United States.

No. 1380, of October Term, 1890

THE MASSACHUSETTS BENEFIT ASSOCIATION

vs.

SARAH G. MILES.

Sur Motion to dismiss Plaintiff's Writ of Error for want of Jurisdiction.

DENENDANT IN ERROR'S PAPER BOOK.

JAS. AYLWARD DEVELIN,
THEO. D. RAND,
RICHARD P. WHITE,
For the Motion.

[Q 73]

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